

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 256/07
AEA 934/05

BETWEEN RONALD DAMS
 Applicant

AND POWERBEAT
 INTERNATIONAL LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Ms Alice Collins, Counsel for Applicant
 Mr Brian Henry, Counsel for Respondent on 24 May
 2006
 Mr Peter Witehira, Advocate for Respondent on 9
 November 2006

Investigation Meeting: 24 May and 9 November 2006

Determination: 22 August 2007

DETERMINATION OF THE AUTHORITY (No 2)

Grievance raised out of time

[1] On the grounds of exceptional circumstances as provided by s 114 and s 115 of the Employment Relations Act 2000 (the Act), the Authority granted the applicant Mr Ronald Dams leave to raise a personal grievance out of time. As required under s 114(5) of the Act, the Authority also directed Mr Dams and the respondent Powerbeat International Limited (Powerbeat) to use mediation to seek to mutually resolve the grievance.

[2] The Authority's determination granting leave is recorded under AA352/06 dated 22 November 2006.

[3] Although eventually mediation was undertaken, the grievance remains unresolved. The Authority was advised of this by counsel Ms Collins on 23 April 2007.

[4] It now remains for the matter to be disposed of with a determination by the Authority of the merits of the grievance and associated issues.

Employment relationship problem

[5] There is no dispute that the employment of Mr Dams with Powerbeat terminated in some way on or after 24 August 2004. The major issue is whether that termination occurred by dismissal, by resignation or by abandonment. The circumstances leading up to termination are recorded in the first few paragraphs of the Authority's determination of 22 November 2006. Briefly they are as follows.

[6] Mr Dams was employed by Powerbeat as a Research and Development Electronics Engineer. He began that work on 26 July 2004 at the company's Mystery Creek premises near Hamilton airport. From that date and for nearly a month until 23 August 2004, in his conduct and performance Mr Dams gave Powerbeat no grounds for complaint or criticism. There has been no evidence or suggestion to the contrary.

[7] On Monday 23 August 2004, in the morning, Mr Dams rang the offices of his employer and spoke separately to two Powerbeat officers or employees, Mr Dave Corr and Mrs Elizabeth Witehira. He told them his car had broken down over the weekend, on the Saturday, while he was driving from Hamilton to Tauranga. Mr Dams advised that he would be taking the day off work to allow him to make arrangements for the vehicle, which was still at Tauranga, to be repaired. Shortly after Mr Dams' call either Mr Corr or Mrs Witehira, or both, reported his absence to Mr Peter Witehira who is the Managing Director of Powerbeat.

[8] The next day, Tuesday 24 August, Mr Dams arrived at work between about 10.30 and 11am. He looked for and found Mr Witehira and requested a meeting. The two entered a nearby boardroom where they sat down and spoke to each other for a short time, perhaps as little as ten minutes or less. No one else was present. After the brief meeting ended Mr Dams collected his things and left Powerbeat's premises, never to return.

[9] There was no further communication of any kind between Powerbeat and Mr Dams, whether by telephone call, email, fax or letter, until 24 November 2004, three months later, when Powerbeat received a letter from a lawyer advising that Mr Dams was pursuing a personal grievance against the company for unjustifiable dismissal. Mr Dams subsequently raised that claim out of time, by leave of the Authority. Although the parties have had mediation, the grievance remains unresolved.

Issues for determination

[10] The issues now to be determined by the Authority are:

- Whether Mr Dams was dismissed by Powerbeat on 24 August 2004, as he claims in his grievance;
- If so, whether Mr Dams' dismissal was unjustified, as he alleges;
- If the dismissal was unjustified, what are the appropriate remedies available to Mr Dams under s 123 of the Act;
- If Mr Dams is held to be entitled to remedies for unjustified dismissal (or any other grievance he may be found to have), whether he contributed to the situation that gave rise to the grievance and if so whether account needs to be taken of such contributory conduct in fixing the level of his remedies;
- With regard to the quantification of remedies, particularly lost wages, whether an express term of Mr Dams' employment agreement limiting the duration of that employment to three months was legally effective, as Powerbeat claims.

Was Mr Dams dismissed?

[11] This is the major question of fact for the Authority to determine in this investigation. The task of the Authority has been to establish what happened, or what is likely to have happened, during the very short meeting that took place between Mr Dams and Mr Witehira in the company boardroom on the morning of 24 August 2004.

[12] Mr Dams' grievance has always been clearly advanced as a claim of actual dismissal rather than any other form of termination by the employer. It has not been contended by Mr Dams that he was constructively dismissed or was unjustifiably disadvantaged in his employment by anything Mr Witehira had said or done to him. In correspondence written on behalf of Mr Dams and also from his evidence, he has always been sure that he was dismissed by Mr Witehira at the end of their 24 August meeting.

[13] As well as alleging that Mr Dams had been unjustifiably dismissed from his position, the initial correspondence from his first solicitor Ms Cynthia Martell-Stark to Powerbeat (not received until 24 November 2004) made a request for the employer to provide a statement in writing of the reasons for the dismissal. This is consistent with a belief held by Mr Dams that he had been actually dismissed. Powerbeat contends that Mr Dams was not dismissed but that he either resigned or abandoned his employment.

[14] After some initial problems with the despatch and receipt of correspondence between the parties, Mr Witehira for Powerbeat on 26 November 2004 wrote back to Ms Martell-Stark saying:

In response to Mr Dams' apparent claim of wrongful dismissal:

- a) *Mr Dams' last day at work was Friday 20 August 2004. On the afternoon of Tuesday 24 August 2004 Mr Dams came to the site and explained he was having car problems. When I questioned about his reasons for not attending work Mr Dams gave a less than honest answer. I warned him that dishonesty was not acceptable. He then stormed out and did not return.*
- b) *Mr Dams was not dismissed, however it was apparent to me from his actions on 24 August that he preferred not to be employed as he told me that it was easier for him to be on the dole.*

[15] Ms Martell-Stark provided further information to Powerbeat about the alleged dismissal in a letter dated 10 March 2005. The following position was put forward on behalf of Mr Dams:

- c) *On 24 August 2004 Mr Dams arrived at work around 10.30 and 11.00am. Mr Dams car trouble resulted in him taking a shuttle bus to work as the PIL [Powerbeat] offices were in an area where no other public transport was available.*

- d) *Mr Dams spoke to Mr Witehira and was then instantly dismissed. Mr Witehira said he didn't want to see him any more and didn't need to pay any further wages.*
- e) *Mr Witehira did not believe the explanation Mr Dams gave nor did he give him any opportunity to further explain and provide proof of his actions.*

Our position is as follows:

- 1) *Mr Dams was instantly dismissed on 24 August 2004 by PIL.*
- 2) *We do not accept that Mr Dams actions on these days amounted to serious misconduct (according to his employment contract) therefore his dismissal was unjustified.*
- 3) *The dismissal was procedurally unfair (lack of proper investigation, no support person at meeting and inadequate opportunity to explain actions).*
- 4) *PIL's assumption that Mr Dams resigned from his position is not accepted. The statement "it is easier to be on the dole" is not evidence of a resignation.*

[16] It is clear then that the grievance raised by Mr Dams was that he was dismissed and that the taking of that action was deliberate and was communicated to him in plain words by Mr Witehira. Usually there can be little room for doubt about the meaning of a statement from an employer to an employee that it does not need to pay any further wages, unless the employee has declared a wish to end the employment.

[17] Mr Witehira replied to the 10 March letter from Ms Martell-Stark on 17 March 2005. His reply included the following:

You seem to be twisting the facts to support an effort to extort funds from this company.

I have already informed you that Mr Dams left his position at Power Beat in favour of what appeared to be a preference for life on the Dole.

It was never our intention to dismiss Mr Dams. However, he made the choice to storm out of a meeting after he realised he had been caught in a lie. As far as I know, Mr Dams never returned to the site.

[18] As the grievance remained unresolved, Mr Dams lodged an application to the Authority on 12 September 2005. In his statement of problem he said of the meeting of 24 August 2004:

- (f) *On 24 August 2004 I arrived at Powerbeat between 10.30am and 11.00am.*
- (g) *I found Peter Witehira in the workshop. He is a Director of Powerbeat. He told me to go to the Boardroom. I went to the Boardroom to wait for him.*
- (h) *Peter Witehira did not accept my explanation for being absent the day before. The meeting ended when he told me he did not want to see me any more and that he was not going to pay me any more. He then left the Boardroom.*
- (i) *After Peter Witehira left the Boardroom, I left the Boardroom and caught a shuttle home. Peter had made it clear I was no longer an employee and that I had been instantly dismissed.*

[19] From the statement of problem as well as the earlier letters, the claim has been consistently made that the dismissal was expressed or communicated by Mr Witehira saying to Mr Dams that he did not want to see him any more and that he was not going to pay him any more.

[20] Mr Witehira on behalf of Powerbeat responded by lodging a statement in reply. In it he said that during the boardroom meeting he had sought clarification from Mr Dams about the reason for his absence the previous day and had counselled him about the general need, as part of his job, to be honest and to exercise good judgement. Mr Witehira wrote in the company's reply that Ms Dams had appeared to take no offence and had said it was easier for him to be on the dole rather than working for Powerbeat. Mr Witehira wrote;

.....at no time did I dismiss Ronald or tell him he was fired. I did not ask him to leave the site or make any gestures to indicate that he was dismissed.

I deny having told Ronald that I "was not going to pay [him] any more". Whilst I may have said that I didn't need to speak to him any further, I did not intend this comment as an indication of termination of employment, I simply indicated that the conversation had ended. In hindsight it now appears that Ronald may have misunderstood what I said to him at the time, however I simply left the conversation at what we had discussed and went back to what I had been doing. I was of the view that Ronald would have taken our discussion as a man to man talk and then got on with his work.

If I had intended to dismiss Ronald I would have taken steps to ensure that a satisfactory procedure was in place. I would have asked Ronald to come back to a formal meeting and advised him that he could have a support person present. I would also have ensured that any confidential information he had in his possession was secure, and that he had an opportunity to obtain any personal possessions before

leaving the site. This did not occur because there was simply no intention to dismiss Ronald. As it was, I finished the conversation and left Ronald sitting in the Boardroom to get on with the work that I had been doing. (Had I actually dismissed Ronald I would not have left him sitting in the Boardroom or left him with free access to the site. Ronald's assertion in this regard is not correct.)

It was awhile later that I found out Ronald had left the site. (I have now learned from Ronald's "statement of problem" that he walked across to the airport and caught a bus back to Hamilton, however I was not aware of this at the time.) Ronald did not return to work. I was away from the office the next day. I now understand that Dr Bydder tried to phone Ronald the next day, without success.

[21] Obviously there is some considerable departure in this reply from two earlier statements of Mr Witehira, written separately, saying that Mr Dams had "stormed out" of the meeting after Mr Witehira had questioned his honesty and/or after Mr Dams realised that he had been "caught in a lie." The clear indication in Mr Witehira's earlier statements was that Mr Dams and not Mr Witehira had been the first to leave the meeting, and that Mr Dams had done so in an a state of anger or agitation, as a response to his exposure as being dishonest.

[22] I find that the statement in reply as written by Mr Witehira and as reproduced in part at [20] above, is the correct version of who brought the meeting to a close and left the boardroom first. It conforms to the version given by Mr Dams and seems more likely to be correct. The sense I got of Mr Dams was that he is calm by nature and not given to physical displays of anger and annoyance. I find that Mr Witehira did not see Mr Dams storm out of the room, because he did not see Mr Dams leave the room at all. When Mr Witehira left Mr Dams in the boardroom to go back to the work he had been doing, he did not see Mr Dams in an angry or agitated state. As Mr Witehira said in the statement in reply (at para 2(g)), he saw Mr Dams appearing not to have taken any offence at what Mr Witehira had been pointing out to him about his honesty.

[23] The question that arises from these differences in Mr Witehira's statements is why to begin with did he twice claim, incorrectly, that Mr Dams had left the meeting first and had "stormed out" in doing so. The possible answers include that Mr Witehira was simply overreacting defensively to a grievance claim that he was surprised or annoyed to receive three months after he had last seen or heard from Mr Dams. Referring on two separate occasions to Mr Dams' claim as amounting to extortion, may be another example of Mr Witehira over-dramatising a situation,

something it appears he has a tendency of doing. He also twice called the claim “outrageous.” At the investigation meeting he acknowledged that his reference to extortion had been an overstatement about Mr Dams’ pursuit of his claim.

[24] Another possible explanation for the change in Mr Witehira’s account of what happened on 24 August is that the earlier statements were deliberate lies, and a third possibility is that Mr Witehira did not have a clear memory of what took place during the meeting but was determined one way or another not to accept any grievance claim arising from those events.

[25] It would be quite understandable if Mr Witehira could not remember exactly what he had said and done at a very brief meeting, after which three months had gone by before he heard any more about it from Mr Dams.

[26] For the Authority’s investigation meeting Mr Dams, as well as other witnesses, prepared a brief of evidence which he presented and was examined on by the Authority and the parties’ representatives. In it he said of the meeting of 24 August 2004 the following:

12. *Peter Witehira did not believe my explanation for not coming to work on Monday. He did not believe I had rented a car, and said I had made up a false name for the rental company, even though I showed him the rental agreement. He asked why I took the shuttle and not a taxi. I explained that the shuttle was \$15 and a taxi was between \$20 and \$25. He said I was just some guy on the dole who took this job just to have a job. He said how old are you? 50? 51? He told me a high school student can sort out his car. He said if I couldn’t sort out my car I was incompetent and immature. He said because they are an R & D company they need people with brains, so he couldn’t use me any more. He told me he didn’t want to see me any more. I asked if I had to finish the week. He said he didn’t want to see me any more and I would not be paid any more.*
13. *There was no discussion of the projects I was working on. Peter Witehira told me I was lying about my car.*
...
17. *After the meeting I packed, and left.*
18. *I had no further contact from Powerbeat. They did not write to me or telephone me. They must have been aware I was not there because they stopped paying my salary.*
...
19. *I believe I was dismissed by Powerbeat on 24 August 2004.*

[27] In his written statement (a sworn affidavit) Mr Witehira gave a bare denial that he had told Mr Dams he would not be paid anymore. He repeated his view given earlier that Mr Dams had chosen to leave the job, ... *for a life on the dole and in front of a computer rather than having the basic discipline required to front up to a job* (para 14. of affidavit). In his oral evidence Mr Witehira acknowledged that during the brief meeting of 24 August he had been openly disbelieving or sceptical of Mr Dams' explanation for his absence the previous day. He acknowledged he had suggested to Mr Dams that he was inadequate if he could not fix a car problem himself. He also acknowledged that the discussion had turned to Mr Dams apparent preference for a life on the dole and considered it possible that it was he and not Mr Dams who had first mentioned being on the dole.

[28] In his statement in reply Mr Witehira portrayed himself as having counselled Mr Dams about exercising proper judgement. I am satisfied that Mr Witehira dominated the discussion and spoke bluntly and directly, without too much thought. This is apparent from what he said about Mr Dams ability to repair his broken down car. Mr Dams was employed as an electronics engineer. Even if he had the knowledge to discover the cause of the apparently mechanical rather than electrical breakdown and then to fix the problem, it is understandable that he did not want to. He was travelling away from his home city with his family – wife and two teenage children – on a weekend excursion. He chose to rescue what he could of the excursion and pay a professional mechanic to find and fix the problem with the car, instead of rolling up his sleeves on the side of the road and trying to find where exactly the problem was in the cooling system and trying to fix it, assuming he could have got access to hoses and other parts without specialist tools. I am satisfied that Mr Dams reasonably took the tenor of Mr Witehira's remarks to be that because of Mr Dams perceived lack of competence as a motor mechanic he was not a suitable person to be employed by Powerbeat. However it is not those remarks that Mr Dams says were the words of dismissal.

[29] I find that Mr Dams has remained consistent in his claim that Mr Witehira had told him he did not want to see him anymore and would not pay him anymore. I accept that claim and the sworn evidence given by Mr Dams in support of it as truthful. Nothing Mr Dams said about his car breaking down has since been undermined or shown to be unreliable in any way, even although Mr Witehira found

himself sceptical and disbelieving of it when he heard of it. I reject Mr Witehira's denial that he said anything about ceasing to pay Mr Dams.

[30] No basis has been shown for the theory that Mr Dams simply raised the grievance claim to extort money from Powerbeat, so that he might have a little more to live on while returning to a life on the dole. Mr Dams has a family in his care. Prior to getting the job with Powerbeat he had experienced the trauma and upheaval of being made redundant. More telling is the fact that some months after he left Powerbeat he did find another job in his field. He has retained that job, even although it requires him to live away from his family in Auckland during the week. This is some sacrifice but one he has made despite any attraction others might see in staying at home on the dole.

[31] In an employment relationship both the employer and the employee owe a duty of good faith to be active, communicative and responsive. This is expressly part of the duty of good faith since December 2004. Prior to then it could reasonably be implied. I consider that some indication that Mr Dams was "sent away" or dismissed by his employer is given by the failure of Powerbeat to make any contact with Mr Dams once it became obvious that he was no longer reporting to work. Mr David Belbin was the accounts and IT manager when Mr Dams worked for Powerbeat. In his sworn affidavit (filed by Powerbeat) Mr Belbin said that he had discussed Mr Dams' absence from work with Mr Witehira on Thursday 26 August. Mr Belbin said he was told by Mr Witehira, *.....after a discussion with Mr Dams on Tuesday.....he had not seen or heard from Mr Dams*. It seems that Mr Witehira was able to connect Mr Dams' disappearance with the Tuesday meeting. Mr Belbin also said in his affidavit that he was told by Mr Witehira to hold off taking payroll action until he, *had a chance to talk to Mr Dams*.

[32] Mr Witehira did not contact Mr Dams despite having his residential address, a home telephone number and an email address. These were all recorded on the Powerbeat employment application form completed by Mr Dams a month earlier in July. Given that the internet was a tool of his trade (and Mr Witehira's), an email message would have been the surest way to reach Mr Dams. Mrs Witehira had previously successfully corresponded with him by email.

[33] Mr Witehira's evidence is that he had left making contact with Mr Dams to Dr Evan Bydder his co-director of Powerbeat who was directly in charge of Mr Dams in

his work. Mr Witehira said that Dr Bydder suggested that he, Dr Bydder, should contact Mr Dams. I find that he did not make contact, whatever attempts he may have made. It should have been easy, as Dr Bydder had access to email from the computer and internet service Mr Witehira had installed for him at his new address around 26 August. What Mr Witehira told Dr Bydder about the meeting of 24 August and how it ended, would have had some influence on how much effort Dr Bydder put into trying to make contact.

[34] Mr Dams did not try and contact Powerbeat in the days straight after the 24 August, but the reason for his inactivity is readily understandable; there was little point as it was clear to him that he had been dismissed.

[35] Powerbeat's inaction towards contacting Mr Dams is some confirmation that the employer was satisfied with the result apparent from Mr Dams' absence; that he would no longer be an employee of Powerbeat. There had been no problem with the performance or conduct of Mr Dams before 23 August, and Mr Witehira said he had progressed well in his job. Yet no contact was made with him after 24 August to confirm the reason for his absence. The likely there was no contact because the employer was quite content to no longer have Mr Dams, having sent him away permanently at the end of the 24 August meeting.

[36] While I consider that Mr Witehira related to Mr Dams insensitively on 24 August, I bear in mind that the claim of grievance is based upon an allegation that Mr Witehira expressly and directly dismissed Mr Dams by saying that he did not want to see him again and that he would not be continuing his pay. On a balance of probabilities I conclude it is likely that Mr Witehira did say those things and that Mr Dams did believe that he had been dismissed. That belief was a reasonable one in the circumstances. I do not accept the evidence of Mr Witehira that he did not dismiss Mr Dams. I find that Mr Dams was summarily dismissed on 24 August 2004 by his employer Powerbeat.

Was the dismissal unjustified?

[37] No possible matters of justification have emerged from the investigation and this is unsurprising given that Powerbeat has always denied dismissing Mr Dams. Powerbeat did not purport to have grounds for dismissal and neither did it purport to

follow a fair procedure to determine whether such grounds existed. I determine that Powerbeat dismissed Mr Dams unjustifiably.

What are the appropriate remedies?

[38] Pursuant to s 123(1)(c)(i) of the Act, Mr Dams claims compensation of \$10,000 for humiliation, loss of dignity and injury to feelings. He also claims to recover 3 months loss of wages pursuant to s 128 of the Act. Remedies under both heads are appropriate, but the quantification of any award to be made is affected by two issues; (i) whether Mr Dams contributed to the situation that gave rise to his grievance, and (ii) whether his actual loss of wages was restricted to 2 months because of the 3 month fixed term of employment expressed in the agreement. He had already received pay for about 1 month, the period of employment up to his dismissal.

(i) Contribution

[39] The question here is whether there was any blameworthy conduct on the part of Mr Dams that was causally connected to his unjustified dismissal. I find there was not and accordingly no reduction of remedies under s 124 of the Act is required. For what appears to have been the first time in his one month employment career with Powerbeat, Mr Dams took 1 day off to attend to something in the nature of an emergency. I have found that there was no deceit or subterfuge involved in his absence, contrary to what Mr Witehira thought. Mr Dams diligence in giving his employer notice on the day of his absence and, as soon as he returned, in seeking out Mr Witehira to make sure he had no problem with his absence, was responded to by Mr Witehira with scepticism, scorn and disbelief, and finally with the dismissal of Mr Dams.

[40] The absence of Mr Dams on 23 August 2004 caused the dismissal but I find that his absence was not blameworthy conduct in the circumstances. He had not previously been warned about taking time off for genuine reasons. After he had given a reasonable explanation and presented with some independent verification of the reason for his absence, Mr Witehira unreasonably continued to display his regard of Mr Dams as being a dishonest employee. It would have been lawfully open to Powerbeat at any time to instruct Mr Dams to attend work every day, come what may. Even then the employer would still have had to consider any explanation he had for being absent and not reject it unreasonably before taking disciplinary action. Mr

Dams however had been given no such instruction in the short period of employment before he was dismissed.

(ii) Was the fixed term of employment effective?

[41] The parties' written employment agreement which Mr Dams read and signed on 23 July 2004, was headed **THREE MONTH EMPLOYMENT CONTRACT**. At clause 1. the contract states that it is "for a fixed term of three months" and at clause 5. that it "will automatically terminate at the end of three calendar months from the date of commencement" (26 July 2004).

[42] The intention of contracting parties is to be taken from the words they have used in their written agreement, provided those words are plain and unambiguous. Under the express terms of the contract alone, Mr Dams could have had no reasonable expectation of on-going employment after the expiry of three months. I accept however that he gained some reassurance from what I find Mrs Witehira told him, that the 3 month term was a standard formality and that Powerbeat had not invoked the fixed term with other staff but had confirmed their permanent employment. Nevertheless Mrs Witehira's comments could not amount to any variation of the contract with regard to its 3 month fixed term.

[43] The terms of the contract according to the intentions expressed in it by the parties, are subject to and must comply with any relevant legislative provisions. The duration of the employment contract is subject to statutory limitations imposed by the Employment Relations Act on fixed term contracting. Those limitations were bolstered by amendments passed in December 2004, although the changes do not apply in this case as the claim arises from a period prior to that time.

[44] The law applicable to the parties' contract is summarised in *Schneller v Ranworth Healthcare Ltd*, unreported, AC 33/07, 5 June 2007, a decision of the Employment Court given by Chief Judge Colgan. With regard to an employment agreement entered into in January 2004 (pre-amendment), at para [17] of its judgment the Court held;

The then applicable law dealing with fixed term employment agreements was set out in s 66 of the Employment Relations Act 2000 and provided as follows:

Parties could agree that the employee's employment would end at the close of a specified date or period or upon the occurrence of a specified event or at the conclusion of a specified event.

Before such agreement the employer must have had genuine reasons based on reasonable grounds for specifying that the employment of the employee was to end in that way.

Further, the employer was obliged to advise the employee of when or how his or her employment would end and the reasons for it ending in this way.

Genuine reasons did not include to exclude or limit the employee's rights under the Act or to establish the suitability of the employee's permanent employment.

[45] The Court noted that the above principles had previously been interpreted and applied in *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213, a case which went to the Court of Appeal but without the statement of law from the Employment Court; see [2004] 1 ERNZ 127. The Employment Court went on to hold, at [19] of the judgment in *Schneller*, that;

If employment was pursuant to a lawful fixed term agreement, the expiry of this agreement according to its terms would not support a claim to an unjustified dismissal. If, however, what purported to be a fixed term employment agreement did not meet the statutory requisites, the employee's employment was to be regarded as of indefinite duration and its termination a dismissal amenable to consideration as a personal grievance alleging that it was unjustified.

[46] The employment of Mr Dams lasted only 1 month not 3, so his personal grievance does not arise from any claim that Powerbeat relied on the fixed term in claiming the employment had ended by passage of time. Even so, the principles set out by the Court in *Schneller* (above) are equally applicable to Mr Dams and Powerbeat; if there was no genuine reason for the fixed term, the employment of Mr Dams is to be regarded as of indefinite duration. In that case his potential loss of

salary would be at least 3 months (\$12,500 gross) as claimed for, rather than 2 months (\$8,333 gross).

[47] I find that Mr Dams and Powerbeat expressly agreed that the employment would end at the expiry of a 3 month period after the date of commencement, 26 July 2004. The written and signed terms of this contract are quite clear in this regard, although no reasons for the fixed term were expressed in the contract.

[48] As to the existence of any genuine reason for the fixed term, Mr Dams claimed in his statement of problem there was none. Mr Witehira refuted that claim in his statement in reply. He said that Mrs Witehira, his wife and PA, had given no assurance to Mr Dams that the 3 month term expressed on his contract was a standard provision for all Powerbeat employees or that confirmation of indefinite employment after that term was a mere formality. He said that had such an assurance been given it would have been expressed in the contract. By the same token it might be thought that if Mr Witehira had told Mr Dams what the reasons for the fixed term were, they too would have expressed in the contract.

[49] In Powerbeat's statement in reply Mr Witehira extensively explained the reasons for the 3 month fixed term expressed in the contract; Mr Dams had been employed on developmental work requiring the use of his qualifications and skills as an electrical-electronics engineer. If the project he was employed on was to proceed to successful conclusion, technological problems or hurdles had to be overcome. If they could not be, the project might have to be scrapped or alternative processes considered. Development of new technologies is a risky business which may fail, and Mr Witehira also explained; ... *the specific skill sets required for a project may at times not match the skill sets of an employee. Because of this it is essential to implement a fixed term contract for at least 3 months to clearly determine whether specific technological hurdles can be overcome by experimentation.*

[50] Other statements by Mr Witehira suggest that the 3 month fixed term was intended to be a period for measuring Mr Dams ability to perform the job;

Specific skills were required to achieve this, which Ronald asserted he had when he applied for the job. The tasks could not be completed by anyone.

If Ronald had been unable to overcome the technical problems the project could not move to the next stage.

Sometimes a different skill set is required for a project if an alternative process is considered appropriate.

In the case of Ronald Dams, it was quite clear that he did have the skills neededDuring the first few weeks of his employment Ronald was able to prove some concepts which had previously remained unproven...

[51] In his oral evidence Mr Witehira introduced a financial explanation for the 3 month term of employment. He said when Mr Dams was employed it had been uncertain whether the company would have the money to continue the project after 3 months.

[52] I am quite satisfied from Mr Witehira's explanations for the fixed term that none of the reasons he gave were made known to Mr Dams when the employment was entered into. I find that the fixed term was intended by Mr Witehira to provide a period in which Mr Dams suitability to do the job could be measured. I find that the 3 month term was addressed at Mr Dams and his employability, rather than at operational circumstances such as availability of finance or scientific feasibility of the project. There is also no explanation for the period being 3 months rather than a longer period of say 6 months, after which results in achieving the technological objectives could have been measured more clearly.

[53] I conclude that the reason for the fixed term of 3 months expressed in the contract was to establish the suitability of Mr Dams for permanent employment after the expiry of the term. Under s 66(3)(c) of the Act this is not a permissible reason. Following *Schneller* (above) the fixed term is ineffective and the contract is to be regarded as one of indefinite duration for the purposes of quantifying the remuneration lost by Mr Dams as a result of his unjustified dismissal.

[54] I also accept the evidence of Mr Dams that he was given no explanation for the fixed term when he was interviewed for the job and before he accepted it. The advertisement for the job made no reference to it being subject to a fixed term and I find Mr Dams only learned of the term when given the contract to sign. He was concerned to find out about it at that late stage because he had turned down the offer

of a permanent job made by Provenco on 21 July 2004. Although the location was in Auckland it was a substantially better paid job. I accept that Mr Dams may have found it preferable to a 3 month fixed term position, had he been made aware of that limitation earlier on. I accept that he then took up his concerns about this with Mrs Witehira and I accept the probability that he was told by her that he need not worry about it. Failing to advise Mr Dams of any reasons for the fixed term was also a breach of s 66 of the Act leading to same result; the contract is to be regarded as one of indefinite duration.

Mitigation of loss

[55] I am satisfied from the evidence of Mr Dams that after he was dismissed on 24 August 2004 he made reasonable efforts to find other employment. Mr Dams provided evidence of his approaches to suitable employers. Factors potentially hindering quick re-employment were his age (51), location and the fact that he had been made redundant previously, which may have stigmatised him in the eyes of some prospective employers. In April 2005 he secured new employment, doing programming work. This is at some inconvenience, as to have this job he must commute to Auckland and stay there for several nights each week, away from his family in Hamilton. His commitment to his job shows that at least in one respect and probably more, Mr Witehira substantially misjudged him as being someone not having;*the basic discipline required to front up to a job.*

[56] Until April 2005 Mr Dams received no income from employment. Any benefit he received and the pay earned by his wife or children in this period, is not required to be deducted from the amount he lost in remuneration while he remained unemployed.

Compensation for loss of expected benefit of employment for indefinite duration

[57] Mr Dams worked for Powerbeat for about 1 month and he was paid for that. Because I have found the fixed term of 3 months in his contract was ineffective, his recoverable losses are not confined to a balance of 2 months salary but can extend to 3 months, as claimed.

[58] I find in any event that this additional 1 months loss, the difference between 2 and 3 months, is recoverable under s 123(1)(c)(ii) of the Act with an award of compensation for loss of an expected benefit of the employment.

[59] Up until the day before he was dismissed there had been no problem with the performance or conduct of Mr Dams. In Powerbeat's statement in reply Mr Witehira spoke approvingly of the progress that had been made by Mr Dams in his first few weeks of employment. There is nothing to suggest that even if the 3 month fixed term had been valid Mr Dams would not have been re-employed at the end of that period, perhaps only for a further fixed term of 3 months, or perhaps permanently. I consider that he might reasonably be expected to have obtained the benefit of ongoing employment after the first 3 month period, if he had not been unjustifiably dismissed. He is therefore entitled to be compensated for the loss of that benefit under s 123(1)(c)(ii). The measure of his loss is the remuneration he would have earned for a period of at least 1 month beyond the first 3 months.

[60] Powerbeat is therefore to reimburse Mr Dams 3 months lost remuneration.

Compensation for humiliation, loss of dignity, and injury to feelings

[61] I accept the evidence of Mr Dams that he was offended, insulted and humiliated by Mr Witehira's comments about his preferring a life on the dole to working, his incompetence in relation to fixing his car and the generally disbelieving attitude of Mr Witehira continued to display towards his explanation for his absence on 23 August, despite Mr Dams showing him, I find, proof in the form of the car rental invoice. All of this dismissive demeanour and attitude from Mr Witehira immediately preceded the actual dismissal of Mr Dams, which occurred when Mr Witehira told Mr Dams he did not want to see him and was not going to pay him any more. The unjustified dismissal was in itself humiliating to an employee who had given no cause for concern about his performance or conduct and had diligently sought out his employer to make sure Mr Witehira was fully informed of what had kept Mr Dams from work on 23 August 2004. I accept that his summary dismissal was deeply stressful to Mr Dams because he had only been back in employment for a brief time after being made redundant earlier and being unemployed for some time. Mr Witehira had been aware of his history in that regard but mocked him about it on 24 August and afterwards in correspondence.

[62] I take into account the unjustified accusation of extortion made twice by Mr Witehira against Mr Dams and his agents and the further offensive comments made about Mr Dams living off pay being earned by his young daughter. Mr Dams had reasonably invoked a procedure that was in the contract Powerbeat drafted and

required Mr Dams to sign. It was not illegal or in bad faith for Mr Dams to rely on that term of his employment agreement, a term which the Act had required to be in the contract in any event.

[63] My assessment is that \$8,500 is the appropriate level of compensation to be paid by Powerbeat to redress the deep and extensive personal harm caused to Mr Dams by his unjustified dismissal.

Determination

[64] In summary, the Authority has determined that Mr Dams was dismissed by his employer Powerbeat on 24 August 2004. That dismissal was unjustified and Mr Dams did not contribute to the situation that gave rise to his personal grievance.

[65] The 3 month term of employment expressly stipulated in the employment contract between Mr Dams and Powerbeat was ineffective because there was no genuine reason for having it and because Mr Dams was not told of any reasons for it. Had Mr Dams not been dismissed he could have expected to receive under his employment contract with Powerbeat remuneration for at least a further 3 months after 24 August 2004. Although he made reasonable efforts to find alternative employment, he had no income in that 3 month post dismissal period.

[66] Accordingly Powerbeat is ordered to pay to Mr Dams the equivalent of 3 months remuneration as fixed by the employment contract. Powerbeat is also to pay Mr Dams compensation of \$8,500 pursuant to s 123(1)(c)(i) of the Employment Relations Act.

[67] Pursuant to clause 11 of Schedule 2 of the Act interest on the 3 months remuneration is to be paid, calculated from the date Mr Dams received his final pay until he is reimbursed the lost remuneration. The rate of interest is to be at 11.5%, which is 9.5% (cf. the current 90 day bill rate of 9.9%) plus 2%, as permitted by clause 11.

Costs

[68] The method of resolution of this claim has given rise to an issue about costs. At the resumed investigation meeting on 9 November 2006, the parties provided written submissions on costs to cover that eventuality.

[69] I consider that in the result of this case Mr Dams is justly entitled to an award of some costs to cover his legal representation for this most protracted investigation. Costs will however be reserved to allow Ms Collins to advise the Authority of the amount of total billings to Mr Dams. At the time the written submissions were made and since mediation, Mr Dams had been invoiced \$2,925 for her representation. Ms Collins anticipated that actual costs including disbursements would be higher. She may have 14 days to confirm the final costs by memorandum to the Authority. A further determination on that issue will then be given.

A Dumbleton
Member of the Employment Relations Authority