

[3] There is no dispute that at least from 25 July 2005 until the relationship ended Mr and Mrs Davis were employees. Mr and Mrs Davis say that they were dismissed from their management positions during a heated exchange with Neil Edge, a director of Toolking Plus, on 31 August 2007.

[4] Mr Edge does not accept that he dismissed Mr and Mrs Davis. He says that they resigned on 31 August 2007 when Mr Davis told him he could *stick his job up his arse* and Mrs Davis said that she would write a letter of resignation.

[5] Mr and Mrs Davis seek the following remedies:

- Compensation for lost wages in the combined sum of \$29,393.00;
- Compensation for humiliation, distress and injury to feelings in the sum of \$8,000 each;
- A declaration that as a term of their employment which subsists beyond termination they are entitled to be paid 10% of the process of the sale of the Hamilton Toolking Plus store;
- A penalty for the failure by the company to provide Mr and Mrs Davis with an employment agreement.

[6] Toolking Plus counterclaim against Mr and Mrs Davis for petrol charged to its EftPos card on 31 August 2007 in the sum of \$83.48. The claim for reimbursement for the ferry fare for Mr and Mrs Davis was withdrawn by letter dated 24 September 2008 sent by Ms Penno following the investigation meeting to Mr Anderson and the Authority.

[7] Mr and Mrs Davis say that they are each owed about three or four days' holiday pay. Toolking Plus accept in the absence of records that Mr and Mrs Davis are owed three days' holiday pay each, although in final submissions, Mr and Mrs Davis claim four days holiday pay each, so that matter will require a finding.

[8] Toolking Plus agree Mr and Mrs Davis are owed one week's pay as they were paid in arrears. Toolking Plus does not accept that the obligation to pay 10% of the sale proceeds to Mr and Mrs Davis remains.

The issues

[9] The issues for the Authority are:

- Whether Mr and Mrs Davis resigned or were dismissed on 31 August 2007.
- If the finding is that Mr and Mrs Davis were dismissed, was the dismissal justifiable?
- If Mr and Mrs Davis were unjustifiably dismissed, what remedies should be awarded, are there issues of contribution and what is the amount of holiday pay owing?
- Was it a term of the Davis' employment that they would be receiving 10% of the proceeds of sale of the shop in Hamilton and, if that was a term of employment, does it survive termination of the relationship?
- Was the claim for a penalty commenced within the required statutory timeframe under s.135(5) of the Employment Relations Act 2000 and, if it was, should a penalty be awarded for the failure to provide employment agreements?
- Does Toolking Plus have a claim with respect to petrol charged to its EftPos card by Mr and Mrs Davis in the sum of \$83.48?

Whether Mr and Mrs Davis resigned or were dismissed on 31 August 2007***The employment relationship leading up to 31 August 2007***

[10] The relationship between Mr and Mrs Davis and Mr Edge was satisfactory until about December 2006. Mr and Mrs Davis' daughter, Julie, was in a relationship with Mr Edge from the time her parents first started managing the shop. The relationship ended in the first half of 2005 but the evidence does not support that this impacted negatively on the relationship between Mr and Mrs Davis and Mr Edge. Mr and Mrs Davis received pay rises, had airfares paid by Toolking Plus for travel to and from the South Island, were given a paid seven day holiday to Australia, and cash bonuses for good results at field days and at Christmas time.

[11] On 17 November 2005, Mr Edge sent a facsimile to Mr and Mrs Davis which provided amongst other matters:

17/11/2005

ATTENTION VAL AND WAYNE DAVIS

On the completion of the Hamilton Branch selling, Val and Wayne Davis will receive 10% of the Total Sale, (this is Goodwill plant and stock) of Toolking Plus Ltd Hamilton. (This is for the Increase of the Value, of this Business.) Val and Wayne will pay their own Tax on the 10%.

[12] Mr and Mrs Davis met with Mr Edge in December 2006 to discuss the sale of the shop and wage arrangements. At that time, Mr Edge advised about them about the plan to split the North and South Island operations of Toolking Plus from the one entity into two with Toolking Plus, the North Island operation and Toolking South Limited, the South Island operation. This was done to show defined turnover for the purposes of selling the Hamilton shop.

[13] Mr and Mrs Davis also wanted at that time a formal splitting of their salary because Mr Davis needed to be able to show that he was employed for ACC purposes. Mr Edge provided a letter in that regard setting out the weekly income for Mr Davis from 4 December 2006 as \$650 gross and for Mrs Davis from 4 December 2006 as \$913 gross.

[14] Mr and Mrs Davis and Mr Edge agreed, albeit for different reasons, that the relationship between them soured somewhat from December 2006. Mr and Mrs Davis said that they noticed a *dramatic change in Mr Edge's attitude* with regular contact stopping between them. They said that they were not involved in any further business discussion and stock would arrive without any prior warning in the shop. Mr Davis said that although the relationship with Mr Edge was difficult for this period, he did not seriously consider resigning because he did not think that he and his wife would receive 10% of the sale proceeds if they resigned.

[15] Mr Edge considered that it was Mr and Mrs Davis' attitude towards him that had changed. He did not accept that there were changes in the way stock was delivered to the shop and he did not believe that Mr and Mrs Davis had ever been part of business planning. He said that Mr and Mrs Davis did not have tea with him after the field days as had occurred in the past and that Mr Davis was hostile when he addressed him. Mr Edge said that when he and William Woodhouse were assembling

log splitters at the back of the shop in or about July 2007, Mr Davis told them that *the sooner you two get the job done and fuck off out of here the better it will be*. Mr Edge also said he was told by Mr Davis to *fuck off* in or about June 2007 when he was with his business partner, Michael Robson, who resides in Australia.

[16] Mr Davis accepted, at least in part, the truth of the circumstances referred to by Mr Woodhouse and Mr Edge in their respective statements of evidence. He said that the exchange was banter and was not meant to be taken seriously. Mr Davis said that the *f* word was regularly used in the workplace and although he accepts that he did use colourful language on occasions, he did not use the *f* word except on the occasions referred to. I accept that Mr Woodhouse and Mr Edge did not take the comments by Mr Davis as banter.

[17] Unfortunately there was no communication between the parties about their concerns and Mr Edge did not deal with any issues that he had in a disciplinary way. It may have been, considering the matter objectively, that both parties simply considered the relationship would end when the shop sold and chose not to address relationship issues in the meantime.

[18] Mr and Mrs Davis had been scheduled to take a period of leave from 14 to 31 August 2007. On 11 August their grandson died in Westport and in discussion with Mr Edge it was agreed that they could attend the funeral following which they then took the pre-arranged period of leave. Mr and Mrs Davis returned from Christchurch to Hamilton as expected on Friday, 31 August at 4.45pm in order to commence work the following day.

Events of 31 August 2007

[19] During the period of Mr and Mrs Davis' leave, Mr Edge had been looking after the shop. He was not happy about the state of things in the shop. He said that the shop was untidy and disorganised. There were some other concerns he had including some arrangements that Mr and Mrs Davis had about lawn mowing.

[20] When Mr and Mrs Davis returned from their leave on the Friday evening, they went into the Hamilton store. Mrs Davis gave Mr Edge \$100 which she owed him. She said that she did not consider Mr Edge to be his usual friendly self and that normally she would have given him a hug. Mr Davis said that he found Mr Edge very blunt. Mrs Davis then went upstairs to the flat with the bags to unpack, and Mr Davis

asked the part time worker at the shop, Ray Mengel, to drive him to the lock-up to get his car out.

[21] Mr Mengel and Mr Davis talked on the journey to the lock-up. I find they discussed Mr Edge's mood during the short drive although I accept that Mr Mengel did not say that Mr Edge's mood was because of Mr and Mrs Davis. There is a dispute about one aspect of the conversation. Mr Mengel said that Mr Davis told him that they were giving three weeks' notice to Mr Edge and that Mrs Davis had full time employment in Christchurch. Mr Davis did not accept that he said anything to Mr Mengel during the trip about resigning. Further, he denied saying that Mrs Davis had a full time job because he said that she did not have one. After Mr Davis retrieved his vehicle from the lock-up, he drove back alone to the shop.

[22] Mr Mengel did not return to the shop from the time that he dropped Mr Davis off until Monday, 3 September 2007. I find that is when he talked to Mr Edge about his exchange with Mr Davis. By that time, Mr and Mrs Davis had left Hamilton and were no longer managing the store.

[23] I find it more likely than not that Mr Davis did make a comment to Mr Mengel about resigning with three weeks' notice. That a comment was made is consistent with Mr Mengel's discussion with Mr Edge on Monday morning and credible in my view because it bore no resemblance to what actually occurred. I am not satisfied that Mrs Davis did have a full time position to go to in Christchurch. There was the possibility of a position for Mrs Davis in Christchurch but no certainty as to when that position would be available.

[24] On return to the Hamilton store, Mr Davis spent a short time looking at the changes that had been made. Mr Edge explained he was not happy with how the shop had looked when Mr and Mrs Davis were on leave. Mr Davis said that Mr Edge became quite angry and he asked Mr Edge to come upstairs and talk to him and Mrs Davis.

[25] Mr Davis and Mr Edge went upstairs to the flat. I shall set them out the accounts of Mr and Mrs Davis and Mr Edge separately.

Mr and Mrs Davis' account

[26] Mr Davis said that he went inside the flat into the lounge and Mr Edge remained at the doorway. Mrs Davis was initially in the bedroom unpacking but she did come out into the lounge during the exchange because of the noisy exchange. Mr Davis said that Mr Edge raised a number of issues about stock from field days, some yellow hammer drills, payments made to Mr Mengel, auctioneers' commission, Mr Mengel doing a personal job in work time and an issue with lawnmowing.

[27] Mr Davis said that Mr Edge was angry and had a raised voice during the exchange and that he felt threatened by him. Mrs Davis said she thought that Mr Edge was going to strike her husband. Mr Davis said there was no opportunity for him to give a proper response to the allegations because Mr Edge was *blowing up and roaring like a bull*. In his evidence at the investigation meeting, Mr Davis said that he told Mr Edge *its obvious you want us out of here*. This statement did not appear in Mr Davis' written statement of evidence. Mr Davis said that Mr Edge then said *I suppose you will want 10% of the sale of the shop and the Hamilton business has run at a loss for the last 18 months* and told them he wanted them out by Monday and he left. Mr and Mrs Davis do not accept that anything was said by either of them about resigning. Mr Davis denied that during the exchange he told Mr Edge to *stick his job up his arse* and Mrs Davis denied that she said she would write out a resignation letter.

Mr Edge's account

[28] Mr Edge agreed that he went up the stairs with Mr Davis and told him he was unhappy about the shop. He said that at an early stage of the conversation Mr Davis told him he could *stick his job up his arse* and the *10% as well*. Mr Edge said that he had not mentioned the 10% in his written statement of evidence because it was something that he had only recalled when giving evidence at the investigation meeting. He said that Mrs Davis then came out of the bedroom and said she would write a letter of resignation although one was never written. Mr Edge agreed he may have told Mr and Mrs Davis to be out by Monday and he agreed that he had made the statement about Mr and Mrs Davis wanting their 10% and that the business had not made a profit.

[29] The sequence of events that Mr Edge described in his evidence at the investigation meeting differs somewhat from Mr Edge's written statement of evidence in which he stated that he ran through the issues he was not happy about after Mr Davis had told him *to stick his job up his arse* and Mrs Davis had said she would write a letter of resignation.

[30] The main concern that Mr Edge recalls discussing was about stock lying in the aisles that he had to tidy and the lawnmower issue. Mr Edge said that while it would have been clear to Mr and Mrs Davis that he was unhappy about the state of things, he did not go *off his head*.

[31] Mr Edge agreed that on Saturday morning the day after the exchange Mr Davis invited him to check through the boxes which were on a trailer Mr Davis had purchased that morning. Mr Edge did not check the boxes. Mr Edge agreed that he went back to Mr and Mrs Davis' flat, I find later in the day on Saturday, to ask that the cash cards and keys be left on the counter. When he saw the flat had essentially been packed away he asked Mr and Mrs Davis to be out by Sunday.

Conclusions

[32] An employer is entitled to rely on resignations that are unequivocal and unambiguous. Case law has always recognised that care may be needed in concluding that there has been a resignation, particularly if it is not unequivocal and words are seized upon as part of an emotional outburst in the heat of the moment – *Boobyer v. Good Health Wanganui Ltd* WEC3/94.

[33] I do not find it likely that Mr Edge intended to dismiss Mr and Mrs Davis when he went to the flat although he was unhappy. It was quite telling in my view that there was no exchange with Mr and Mrs Davis about their leave as would be expected.

[34] I have carefully considered the two accounts as to what took place when Mr Edge followed Mr Davis to the flat. I conclude it more likely that Mr Davis did not take the criticism well. He believed that Mr Edge in raising issues of concern wanted the relationship to end in a way that avoided payment of 10% of the sale proceeds. Mr Davis also believed that the concerns raised were unjustified. Against that background I find that Mr Davis in all probability did make an inappropriate comment about what Mr Edge could do with his job. Having carefully considered the two

accounts, it is unlikely that Mr Edge would otherwise have asked Mr and Mrs Davis be out by Monday.

[35] I find Mr Edge's anger increased because Mr Davis was not responding well to the criticism which was a concern that Mr Edge already had about his relationship with Mr Davis. I think it likely that Mr Edge as set out in his statement of evidence probably continued on with his other concerns. There was a statement made about Mr and Mrs Davis wanting 10% of the sale proceeds and the fact that the business had not made a profit was made. I find it less likely that Mrs Davis would have offered to write a letter of resignation, but if I am incorrect in that regard no letter of resignation was ever written or asked for. A fair and reasonable employer would not, in the absence of a letter or at least a further discussion about resignation, have concluded that this statement, on its own, amounted to a clear intention to resign.

[36] Mr Edge took the words of Mr Davis uttered in the heat of the moment as an intention to resign and he advised Mr and Mrs Davis that he wanted them out as soon as possible and, by Monday. The time for the Davis' to leave was brought forward to Sunday the next day when Mr Edge saw their belongings were packed up.

[37] My findings are not changed in any material aspect by the evidence of Mr Mengel about a telephone conversation he had with Mrs Davis after the exchange on the Friday night. Mr Mengel accepted that Mrs Davis was distressed during the conversation in which she referred to Mr Edge and said that he had *gone off his head and complained about the state of the shop* and that *she and Wayne were out of there and Neil wanted them out by Sunday or Monday*. Mr Mengel said that Mrs Davis did not say that she had been sacked or dismissed, but did say that she offered Mr Edge their resignation. Mrs Davis did not agree that she had made any statement about resignation to Mr Mengel. I have already found that even if Mrs Davis had offered to write a letter of resignation, a fair and reasonable employer would not have relied on the statement without further discussion and clarification particularly in the absence of a letter.

[38] Mr Edge was entitled to raise concerns with Mr and Mrs Davis and I accept that he was intending to return to Christchurch on the Saturday and so there was a limited timeframe to do so. It was unfortunate that such discussion took place so soon after Mr and Mrs Davis had arrived back from leave. There was no evidence to suggest that Mr and Mrs Davis were expecting complaints to be raised with them and

some warning in advance of the issues Mr Edge wanted to talk about may have prevented escalation of the matter. Mr and Mrs Davis were entitled to have a proper opportunity to respond to the concerns and, with emotions running high during the exchange, that was not possible.

[39] A pre-existing plan to resign on the part of Mr and Mrs Davis was relied on by Mr Edge but I am not satisfied that there was a plan as such and certainly not one that involved resigning with immediate effect. Mr Edge was no doubt suspicious when he spoke to Mr Mengel on the Monday but the Davis's had just returned from holiday on 31 August 2007 and were in the process of unpacking. They did not have another home to go to and I am not satisfied from the evidence that there was a job available for Mrs Davis.

[40] Anything said by Mr and Mrs Davis on the evening of 31 August 2007 that was subsequently relied upon to support that they intended to resign was part of an angry and heated exchange and a reaction to Mr Edge raising concerns. Once the heat of the moment had passed it would, objectively assessed, have been apparent to a fair and reasonable employer that the Davis' did not intend to resign with immediate effect and leave their accommodation. Whilst Mr Edge was entitled to raise concerns with Mr Davis about his language and/or any other issues, including in a disciplinary setting he was not in the circumstances outlined, entitled to have relied on words spoken during the heated exchange as Mr and Mrs Davis's resignation and/or intention to resign. Reliance could not safely be placed on the fact that Mr and Mrs Davis packed up their belongings in circumstances where they had been asked to leave as soon as possible and, by Monday which was later changed to Sunday.

[41] A fair and reasonable employer would have gone to see Mr and Mrs Davis in their flat the next day when the heat had gone from the situation to discuss and clarify their intentions. That was what was required. Instead, when Mr Edge met with Mr and Mrs Davis, he asked for his key and cash cards and told them to be out of the flat by Sunday.

[42] By treating Mr and Mrs Davis as having resigned after the conversation on 31 August 2007 and confirming a date by which Mr and Mrs Davis had to leave I find that Mr and Mrs Davis were dismissed.

Was the dismissal justifiable?

[43] I have considered justification objectively as I am required to under s.103A of the Employment Relations Act 2000. A fair and reasonable employer would not have found that the performance issues in the absence of previous warnings amounted to serious misconduct that would justify dismissal. Although I have found that Mr Davis in all likelihood did make an inappropriate suggestion about what Mr Edge could do with his job, there was no proper disciplinary process and opportunity for explanation in terms of that outburst. A fair and reasonable employer would have taken into account that Mr Davis had been confronted with the concerns when he was not expecting to be and that he had not previously been warned. I do not find in all the circumstances, that a fair and reasonable employer would have dismissed Mr Davis.

[44] The dismissal was unjustified. Mr and Mrs Davis have personal grievances that they were unjustifiably dismissed from their employment with Toolking Plus and they are entitled to remedies.

What remedies are appropriate and are there issues of contribution?***Mr Davis******Lost wages***

[45] Mr Davis claims lost wages for 31 weeks from 1 September 2007 until 1 April 2008. Mr Anderson submits that Mr Davis made every attempt to mitigate his loss over this period by applying for numerous jobs. Mr Davis said in his evidence at the investigation meeting that he telephoned and responded to three advertisements but felt that he could not, in the circumstances, provide a reference given the nature of his departure from Toolking Plus. He said that when he mentioned he was taking a personal grievance claim there was no further interest shown in employing him. Mr Davis said that he did not apply directly to any other employer but placed his name with three employment agencies.

[46] In those circumstances, and given that the employment relationship may well not have continued for a significant period, I find under s.128 of the Employment Relations Act 2000 lost wages should be assessed at no more than three months. I assess Mr Davis' loss of earnings at \$8,450 gross being assessed at the rate of \$650 per week for 13 weeks.

Compensation

[47] I accept that Mr Davis was distressed at the time of his dismissal. He felt that he had put considerable work and effort into the shop and was then required to leave at short notice. He said that he stayed up with Mrs Davis until 1 am to pack up the flat after the exchange on the Friday evening. He said in his evidence that he had heard allegations from friends in Westport that he had stolen from the shop and doctored the books and did not feel he could face friends in Westport again. Mr Edge denied any such rumours being spread by him and the evidence does not satisfy me that, if there were such rumours, Mr Edge was the party responsible for them

[48] Taking into account all the evidence an appropriate award for compensation for Mr Davis is \$6,000.

Contribution

[49] The Authority is required to consider the extent to which an employee contributed to the situation that gave rise to the personal grievance and, if the action requires, reduce the award that would otherwise have been made.

[50] I have found that the timing of Mr Edge raising issues of concern was unfortunate, coming as it did very shortly after Mr and Mrs Davis had returned from leave. I accept Mr Davis did not feel that he had a proper opportunity to respond. I do find, however, that had Mr Davis not made the comment which was inappropriate to Mr Edge, then matters may not have progressed to the stage where they did. I find that in that way Mr Davis did contribute in a blameworthy way to the personal grievance.

[51] I have also considered whether Mr Davis contributed to the situation by not communicating about the events of 31 August 2007 with Mr Edge the following day, given that a duty of good faith requires both parties to an employment relationship to be active and constructive, in maintaining a productive employment relationship in which the parties are communicative.

[52] Mr Davis said that he did not talk to Mr Edge about the exchange because he had been dismissed by him. The duty of good faith in a situation such as this does require both parties to communicate about what has occurred so that employment relationship problems such as this one can be resolved without the need for judicial

intervention and if possible enable the relationship to continue. If all parties to employment relationships took the view that it was for the other party to make the first move then it is less likely employment relationship problems would resolve at an early stage. I take into consideration that whilst the visit by Mr Edge to the flat the next day may have presented an opportunity for communication and discussion, Mr Edge advised during that visit that Mr and Mrs Davis were to be out by Sunday. I do, however, conclude that Mr Davis did contribute to the personal grievance by not talking to Mr Edge on the Saturday about his view of the exchange.

[53] I assess Mr Davis' contribution at 30%. Applying that figure to the award, in terms of lost wages and compensation I now make the following orders:

- (a) I order Toolking Plus Limited to pay to Kenneth Wayne Davis the sum of \$5915 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000;
- (b) I order Toolking Plus Limited to pay to Kenneth Wayne Davis the sum of \$4,200 without deduction being compensation for humiliation, loss of dignity and injury to feelings.

Holiday pay

[54] I find, notwithstanding the absence of any records, that holiday pay should be assessed on the basis of three rather than four days' owing. I have calculated Mr Davis is owed on that basis the sum of \$390 gross for holiday pay. I reserve leave for either party to return to the Authority if there is an issue with that calculation.

One week's pay

[55] Toolking Plus agrees that Mr Davis is owed one week's wages because he was paid in arrears. Toolking Plus Limited to pay to Kenneth Wayne Davis the sum of \$650 gross being one week's wages.

Mrs Davis

Lost wages

[56] Mrs Davis said that she had not looked for a new position after her employment was terminated but she did obtain a position on 22 November 2007. In

the interim, Mrs Davis helped her daughter in her business but I accept did not receive any money for doing so. By helping her daughter, Mrs Davis felt she was contributing to the cost of food and accommodation whilst she and Mr Davis were staying with their daughter. Mrs Davis said by way of explanation for the period for which she did not look for a position that it took her some time to get over the upheaval from Hamilton and the loss of her position.

[57] An employee is required to attempt to mitigate their loss of wages. I do not consider that Mrs Davis' failure to mitigate her loss should be visited entirely on Toolking Plus. I do accept that there was, in this case, a more significant upheaval for Mrs Davis than may normally have been the case and an award must reflect that there would be a period of settling down. Mrs Davis had to leave not only her job, but also her accommodation that went along with that job, and the city where she had been employed.

[58] I am not, however, satisfied that Mrs Davis' loss of wages was caused to a significant degree by her personal grievance. Her own choice not to look for a position was a significant factor in the loss.

[59] In those circumstances, I consider it appropriate that Mrs Davis be reimbursed for the equivalent of three weeks' wages. That amount is \$2,739 being three weeks at \$913 per week.

Compensation

[60] I accept that Mrs Davis was distressed by her dismissal and she said she had never been spoken to by anyone like she had been on the evening of 31 August 2007 by Mr Edge. Mrs Davis spoke of the fear that she felt at the time and the impact on her confidence and a sense of betrayal because she felt she had worked very hard in the shop over the years.

[61] In those circumstances, I find that an appropriate award for compensation would be the sum of \$6,000.

Contribution

[62] I do not find that Mrs Davis contributed to the situation that gave rise to the personal grievance because I accept that she felt quite scared during the exchange and

did not consider she was able to meet with Mr Edge or talk to him. I do not reduce the awards made.

Holiday pay

[63] I find that, notwithstanding the absence of any records, the holiday pay should be assessed on the basis of three rather than four days' owing. On that basis, I have calculated that Mrs Davis is owed the sum of \$547.80 gross for holiday pay.

[64] I reserve leave for either party to return to the Authority if there is an issue with that amount assessed.

One week's wages

[65] Toolking Plus agrees that Mrs Davis is owed one week's wages because she was paid in arrears. Toolking Plus Limited is to pay to Valerie Davis the sum of \$913 gross being one week's wages.

Was it a term of the Davis's employment that they would be receiving 10% of the proceeds of sale of the shop in Hamilton and, if that was a term of employment, does it survive termination of the relationship.

[70] The shop in Hamilton has not yet been sold. Mr Edge said in his written statement of evidence that if he sells the business they [the Davis's] will get 10% of the proceeds of sale. He confirmed that in his evidence at the investigation meeting.

[71] In her letter of 24 September 2008 and final submission, Ms Penno submits that the obligation to pay 10% of the sale proceeds to the Davis's no longer exists. Ms Penno submits Mr Edge agreed to the 10% payment as a way of recognising the Davis's contribution in realising value from such a sale. At the time the relationship terminated there was an interested purchaser. Now Ms Penno says the Davis's have been absent from the business for over a year and the effect of the passage of time is that their influence on a sale price and Mr Edge's desire to recognise that are rendered nil.

[72] The Davis's did understand that their efforts in the shop would increase the value of the business when it sold and that would benefit them in terms of the payment they eventually received. It was an incentive for the Davis's to work hard and they gave evidence that they did work hard during their employment. There is no

express provision in the agreement set out in the letter of 17 November 2005 as to when the obligation to pay 10% to the Davis's ends. I am not satisfied there is any good reason to imply such a term into the agreement.

[73] Although the Davis's seek a declaration that this was a term of their employment that they would receive 10% of the proceeds of sale, a finding from the Authority will be sufficient. The Davis's are entitled to a finding that the following is a term of their employment which subsists beyond termination:

It is a term of the Davis's employment that on completion of the Hamilton Branch selling, Mr and Mrs Davis will receive 10% of the total sale, (goodwill, plant and stock) of Toolking Plus Ltd Hamilton. Mr and Mrs Davis are to pay their own tax on the money received.

Was the claim for a penalty for failing to supply Mr and Mrs Davis with an employment agreement commenced within the required statutory timeframe (s.135(5) Employment Relations Act 2000)?

[74] The claim for a penalty was made for the first time in final submissions. I revisited the statement of problem and a discussion that I had recorded in writing at the time of the investigation meeting about issues. I could not see any reference in the statement of problem, the attached letter to the statement of problem or matters that I had recorded to a claim for a penalty.

[75] I am not satisfied that the claim for a penalty was raised within the required timeframe. I did not hear any evidence from Mr Edge in relation to this claim and I do not find that such a claim is now available to the applicant.

Claim for \$83.48

[76] After the heated exchange on 31 August 2007, the evidence supports that Mr and Mrs Davis used the Toolking Plus EftPos card to purchase petrol in the sum of \$83.48. In all the circumstances, I am not satisfied that they should have used the fuel card in this way in the circumstances where they believed their employment had been terminated without first obtaining the authorisation of Mr Edge.

[77] I am satisfied that the respondent has made out its counterclaim and an order should be made for reimbursement to Toolking Plus Limited of the sum of \$83.48.

[78] I order Kenneth Wayne Davis and Valerie May Davis to pay to Toolking Plus Limited the sum of \$83.48.

Costs

[79] I reserve the issue of costs and I would encourage the parties to reach agreement. In the event that agreement is not able to be reached with respect to costs, then Mr Anderson has until 19 December 2008 to lodge and serve submissions on behalf of the applicant as to costs and Ms Penno has until 30 January 2009 to lodge and serve submissions in reply on behalf of the respondent.

Summary of findings and orders made

- I have found that Mr and Mrs Davis were unjustifiably dismissed from their employment on 31 August 2007.
- I have assessed Mr Davis's contribution at 30%.
- I have not found that Mrs Davis contributed to the personal grievance.
- Taking contribution into account I have ordered Toolking Plus Limited to pay to Mr Davis the sum of \$5915 gross being reimbursement of lost wages.
- I have ordered Toolking Plus Limited to pay to Mrs Davis the sum of \$2739 gross being reimbursement of lost wages.
- Taking contribution into account I have ordered Toolking Plus Limited to pay to Mr Davis the sum of \$4200 without deduction being compensation for humiliation, loss of dignity and injury to feelings.
- I have ordered Toolking Plus to pay to Mrs Davis the sum of \$6000 without deduction being compensation for humiliation, loss of dignity and injury to feelings.
- I have calculated that Toolking Plus owes holiday pay to Mr Davis in the sum of \$390 gross (three days) and to Mrs Davis in the sum of \$547.80 gross (three days) and have reserved leave for either party to return to the Authority if necessary with respect to those calculations.

- I have recorded Toolking Plus Limited agreement that Mr and Mrs Davis are owed one weeks wages each as they were paid in arrears. Mr Davis is owed \$650 gross and Mrs Davis \$913 gross.
- I have made a finding that a term of Mr and Mrs Davis's employment that subsists beyond termination is that they will receive 10% of the total sale of Toolking Plus Limited in Hamilton.
- I have not found that the claim for a penalty was commenced within the required statutory timeframe.
- I have ordered Kenneth Davis and Valerie Davis to pay Toolking Plus in terms of the counterclaim the sum of \$83.48 for petrol charged to its account.
- I have reserved the issue of costs and failing agreement have timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority