

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 108
3010892

BETWEEN SHAKEEL GILL
 Applicant

AND SOUTH AUCKLAND
 VEHICLE IMPORTS
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: David Prisk for the Applicant
 Mohammed Sahu Khan for the Respondent

Investigation Meeting: 28 September and 19 December 2017 and 17 January
 2018

Submissions received: At the investigation meeting and 2 February 2018 for the
 Applicant
 26 January 2018 for the Respondent

Determination: 29 March 2018

DETERMINATION OF THE AUTHORITY

- A. Shakeel Gill’s employment was affected to his disadvantage by South Auckland Vehicle Imports Limited’s actions in giving him warnings in August and November 2016.**
- B. Mr Gill was unjustifiably dismissed by South Auckland Vehicle Imports Ltd.**
- C. After taking into account Mr Gill’s contribution, South Auckland Vehicle Imports Ltd is ordered within 28 days of the date of this determination to pay Mr Gill the following remedies for his**

personal grievances:

- (i) **\$3,744.00 gross as lost wages; and**
 - (ii) **\$1,200.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- D. Within 28 days of the date of this determination South Auckland Vehicle Imports Limited is ordered to pay Mr Gill:**
- (i) **\$7,082.24 gross in arrears of wages;**
 - (ii) **\$1,000.00 gross as commission for the sale of four cars;**
 - (iii) **\$557.28 gross for public holiday pay;**
 - (iv) **\$1,152.00 gross for alternative holidays; and**
 - (v) **\$2,604.97 gross for holiday pay.**
- E. Within 28 days of the date of this determination South Auckland Vehicle Imports Ltd is to pay a penalty of \$8,000.00, for breaching the Minimum Wage Act and the Employment Relations Act, to the Employment Relations Authority at Auckland (for payment into a Crown bank account).**
- F. A copy of this determination is to be referred to the Labour Inspectorate.**
- G. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] Shakeel Gill was appointed by South Auckland Vehicle Imports Limited (SAVI or the company) in December 2015 to work as a salesman at a SAVI car yard. The company's head office was in Papatoetoe. Some wholesale car sales were run from that site, as well as an automotive repairs and compliance business. The yard where Mr Gill worked was originally elsewhere in Papatoetoe but in mid 2016 moved to Manurewa. For most of Mr Gill's employment the yard was staffed only by him and the manager Rupinder Kaur.

[2] In October 2016, as a result of contact from another employee of SAVI or an associated company, the Labour Inspectorate came to SAVI premises and interviewed staff, including Mr Gill. No enforcement action appears to have been taken as a result.

[3] In August and November 2016 Mr Gill was given written warnings regarding his performance. On 30 November 2016 SAVI dismissed Mr Gill for what the dismissal letter refers to as problems with his “performance, behaviour, attendance, punctuality, breach of policy [and] complaints from customers”.

[4] Mr Gill brings unjustified disadvantage and dismissal claims, and also seeks various arrears which he says are owing to him. SAVI denies his claims.

[5] There were difficulties completing the investigation meeting in this matter. Meeting dates had to be adjourned due to health issues concerning the Respondent party. Directions to SAVI to file documents were only partially complied with, sometimes without explanation.

[6] The investigation meeting was held on 28 September 2017, 19 December 2017 and 17 January 2018. I heard in person from Mr Gill, Navin Sharma (director and co-owner of SAVI) and Ms Kaur. I also heard by telephone from four other people who had contact with the yard and/or Mr Gill. They included the landlord of the yard’s Papatoetoe premises.

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

Issues

[8] The issues for determination are:

- (a) Was Mr Gill subject to an unjustified disadvantage by SAVI regarding the August 2016 warning?
- (b) Was Mr Gill subject to an unjustified disadvantage by SAVI regarding the November 2016 warning?

- (c) Was Mr Gill unjustifiably dismissed?
- (d) If Mr Gill establishes personal grievance claims, what remedies, if any, should he receive?
- (e) Is Mr Gill owed any wages by SAVI?
- (f) Is Mr Gill owed any commission by SAVI for selling cars for the company?
- (g) Does SAVI owe Mr Gill pay regarding public holidays?
- (h) Does SAVI owe Mr Gill holiday pay regarding annual leave?
- (i) Did SAVI breach the Minimum Wage Act 1983, and if so, should it be penalised?
- (j) Did SAVI breach s 130 of the Employment Relations Act regarding time and wage records, and if so, should it be penalised?

Credibility

[9] There was substantial conflict between the evidence of Mr Gill on the one hand, and Mr Sharma and Ms Kaur on the other. Some assessments of credibility need to be made. However, there were significant internal inconsistencies within all three witnesses' evidence, as well as between each of those three witnesses' evidence and documents filed. These are outlined below.

[10] I must assess credibility in a common sense, but fair way, recognising that it is difficult to assess credibility through demeanour alone.¹

[11] In some instances I have preferred Mr Gill's evidence. However, I did not accept his evidence in its entirety, as will be evident below. In other instances I have had to decide between the credibility of Mr Sharma and Ms Kaur.

Employment agreements

[12] On 18 December 2015 the parties signed an employment agreement (the first employment agreement). This is for Mr Gill's role as a sales person. The general responsibility for that position was to maximise car sales.

[13] A letter dated 3 March 2016 from Mr Sharma to Mr Gill was filed. This was created in relation to Mr Gill's visa application. He had been on a one year job search

¹ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [303] to [304]

visa, which was to expire in about May 2016. He was applying for a work visa which would be linked to SAVI.

[14] The letter states that Mr Gill:

has been offered employment as an Assistant Manager. The employment will begin as soon as his work visa is approved. This offer is open until his application has been approved.

Mr Gill will be employed as an Assistant Manager and will be responsible for yard operations and functions. The initial starting salary will be \$18.00 per hour and the working hours will be minimum 40 hours per week.

[15] With that letter is a job description for the assistant manager role.

[16] Another written employment agreement was later entered into, reflecting the offer set out in 3 March 2016 letter (the second employment agreement). That agreement is recorded as being signed by Mr Sharma on 2 May 2016 and by Mr Gill on 26 April 2016.

[17] The commencement date in Schedule 1 was to be as soon as possible or a date which may be entered by hand. Two different versions of Schedule 1 were filed, one by each of party. One has what appears to be a handwritten "18" in the date space. The other has \$18.00. I am not satisfied that any alternative commencement date, other than as soon as possible, was agreed.

[18] Under the second employment agreement Mr Gill was appointed as assistant manager and paid a base salary of \$18.00 per hour.

[19] Although neither party took issue with it, I have some questions about the propriety of the second agreement documentation filed by the parties. There were inconsistencies which were not explained. For example, the agreement filed by Mr Gill has a Schedule 2 which lists his remuneration. A header on that page is consistent with the remainder of the document and he has initialled the page. The version of the second agreement which SAVI filed has a different Schedule 2 without the header consistent the rest of the document. It contains a job description for the sales person job (similar to that attached to the first employment agreement) whereas Schedule 1 of the second employment agreement describes the position as assistant

manager. Schedule 2 filed by SAVI is initialled by both parties, whereas only Mr Gill has initialled the remainder of the document.

Labour Inspectorate

[20] During Mr Gill's employment with SAVI, another employee within SAVI or an associated business contacted the Labour Inspectorate. Although Mr Gill was interviewed away from Mr Sharma, Mr Gill says that during his interview with the Labour Inspector Mr Sharma phoned him three times to warn him that if he told her anything unacceptable, Mr Sharma would have him deported. Mr Sharma accepts that he phoned Mr Gill, as he was trying to get hold of the yard but no one answered. He denies putting any pressure on Mr Gill.

[21] Mr Gill says that when the Labour Inspector asked SAVI for timesheets Mr Sharma could not provide any as timesheets were not filled in. Further, about two weeks later, on 3 November 2016 Mr Sharma gave himself and Ms Kaur timesheets² to fill out, retrospectively. These will be referred to in more detail below. Mr Sharma gives a different explanation for any delay in filing timesheets, relating to them being in storage.

Car grooming

[22] Mr Gill says that his job had not originally included providing a full grooming of cars. This was done by an external provider. His work was focused on selling cars and keeping the yard tidy. He also moved cars between SAVI premises, and took them to out for things such as getting registration and petrol. However, at some stage business was not so good. Mr Gill places this from the time of the move to Manurewa. He says that from then he was required to groom the cars which could take two to three hours per car.

[23] Mr Gill says that he could not keep up with the amount of work required when car grooming was added. He complained to Ms Kaur, who told him that he had to do the grooming as the business was not going that well.

² Entitled weekly time record

Warning in August 2016

[24] Mr Gill's claim is that he was given a written warning about his car grooming performance in August 2016. He was unable to provide a copy of the warning, having mislaid it.

[25] During the investigation meeting SAVI produced a warning letter dated 5 August 2016, signed by Mr Sharma, although this related to a different matter, which would not usually be described as a performance issue. Mr Gill denied having seen that warning letter before. No copy of a performance warning in August was supplied by SAVI.

[26] Mr Sharma accepted that Ms Kaur gave Mr Gill a written warning in August 2016 regarding car grooming. In addition, SAVI's letter of 28 November 2016 has the subject line "Second Written Warning for Poor Job Performance". Ms Kaur then refers to "the written warning which I gave you in August" and goes on to state that he has not made "sufficient improvements in any of the areas that were identified as needing immediate improvement". These references do not appear consistent with the 5 August 2016 letter filed by SAVI.

[27] The dismissal letter also refers to the 29 November 2016 letter being the second warning. I am satisfied that the 5 August 2016 letter is not the warning letter Mr Gill bases his personal grievance claim on. I accept that there was a written warning given by Ms Kaur to Mr Gill in August 2016 regarding performance.

[28] Mr Gill and Ms Kaur refer to an incident about which the warning was given. A car had been sold to a customer and Mr Gill had been asked to groom it. His explanation for failing to do so before the customer arrived was that he had too many other jobs. There was no evidence that he had had any discussion at the time with Ms Kaur about the difficulty and which job/s to prioritise.

[29] Mr Gill says that the warning letter did not mention grooming. His recollection was that the letter listed general topics such as performance, punctuality, and breach of policy, like the subsequent warning did. He says that there was no discussion about the details of what those things were other than reference to the car grooming not being done.

[30] Although there was a basis for the warning to be given on the grooming issue as Mr Gill continued with his other jobs although aware that the grooming was required, there are procedural difficulties. No evidence produced by SAVI regarding the setting up of a disciplinary meeting. That suggests that a fairly informal process was used.

[31] I am not satisfied that Mr Gill was told in advance what the discussion was going to be about, or that he had the opportunity to provide an explanation which the company considered before issuing the warning. No mention was made of the possibility of a support person or representative being involved. He was told what the issue was and given the warning at the same time. Therefore SAVI did not act as a fair and reasonable employer could have done. Mr Gill's employment was affected to his disadvantage by SAVI's giving him a warning.

[32] I will consider below any remedies regarding this personal grievance along with remedies for other grievances established.

Warning in November 2016

[33] As referred to above, SAVI gave Mr Gill a second performance warning in a letter dated 28 November 2016. It refers to Mr Gill's performance at work continuing at an unacceptable and unsatisfactory level. Specifics of the performance issue/s are not provided, although the earlier warning is referred to having been about "performance, behaviour, attendance, punctuality, [and] breach of policy".

[34] The letter goes on to state that:

This letter serves to warn you that unless your work performance improves to an acceptable level, further corrective action will be taken. Your work performance will now be inspected and reviewed on a weekly basis...

[35] Mr Gill signed as having received the warning on 29 November 2016. He said that there was no discussion about what the issues were other than a reference again to grooming. No particular company policy was referred to. Mr Sharma said that the warning related to a car that got rejected by the AA because it was dirty as a result of inadequate grooming by Mr Gill.

[36] There are aspects of the letter which suggest that it was based on a form letter. It refers to the warning letter "I gave you in August month". The signature piece at

the bottom refers to a failure to improve my “performance, punctuality, attendance, conduct etc”.

[37] My sense is that the “performance, behaviour” etcetera list was a menu to be chosen from but which SAVI left in unedited.

[38] There was inconsistent evidence given by Mr Sharma and Ms Kaur regarding the process of the warning being given. Mr Sharma said that he was not involved in the warning process, although he was informed about it. Ms Kaur said that Mr Sharma was involved in a meeting with her and Mr Gill as part of the process. I prefer Mr Sharma’s evidence in this regard.

[39] As with the first warning, there was substantive justification for a warning being given, but SAVI did not act in a procedurally fair manner. I am not satisfied that Mr Gill was told beforehand the subject of the discussion, told about having a support person or representative present, or given opportunity to provide an explanation before the decision was made to issue the warning. Therefore SAVI did not meet the test in s 103A(2) of the Act to act as a fair and reasonable employer could have done. Mr Gill’s employment was affected to his disadvantage by SAVI’s giving him a warning. Remedies will be considered below.

Dismissal

[40] On the same day that Mr Gill signed for the second performance warning, 29 November 2016, another employee phoned Mr Gill and told him that there was discussion at work about dismissing Mr Gill.

[41] On 30 November 2016 Mr Gill called in sick so he could go into see the Labour Inspector. Later that day he was told by Ms Kaur to come into work.

[42] Ms Kaur’s evidence was that a meeting was held between her, Mr Gill and Mr Sharma. However, neither Mr Gill nor Mr Sharma confirmed Ms Kaur’s presence, and I prefer their evidence to hers.

[43] Mr Sharma met with Mr Gill and told him that they had been receiving complaints about his grooming and gave Mr Gill a letter terminating his employment effective on the same day. The reasons given were problems with his “performance,

behaviour, attendance, punctuality, breach of policy, complaints from customers”. No details are provided in the letter regarding those items.

[44] The letter goes on to say:

As we deliver you second warning letter November 29, 2016 told you to improve some areas straight away which you did the opposite. Unfortunately your action in this matter leaves us no choice. As we gave you enough chances to improve. Your action is getting worse.

[45] Although the letter lists performance, behaviour, attendance etcetera as the ground for dismissal, I am satisfied that the reason given to Mr Gill when the letter was given to him was to do with his grooming of cars.

[46] SAVI says that three months (from August) was sufficient time Mr Gill to improve his performance. That may be so, however, there was a period of three months until 29 November 2016 with no warnings given, which Mr Gill was entitled to consider meant that further issues with his performance had not been identified.

[47] SAVI then decides to give a second warning regarding a new incident. The dismissal occurred one day after the second warning was received. There was no clear evidence of any further incident having occurred. Mr Gill was not allowed sufficient time to improve after the second warning. A day is insufficient time, especially when SAVI had indicated in the 28 November 2016 letter that it would be doing weekly checks on Mr Gill. He was entitled to expect that he would get at least a week to improve.

[48] There were also similar procedural issues with the dismissal as there had been with the warnings. Mr Gill was not given proper notice, a chance to be represented, and a chance to explain and have any explanation considered before the decision was made. SAVI therefore did not meet aspects of the test in s 103A(3) of the Act.

[49] Mr Gill was unjustifiably dismissed by SAVI. Remedies will be considered below, as I need to decide an issue about Mr Gill’s hours of work first.

Mr Gill’s hours of work

[50] The issue about what Mr Gill’s actual hours of work and pay were at SAVI runs through several of his claims so I shall deal with that issue first. Mr Gill’s actual

work hours, both which days and the total number of hours, are disputed with him saying he worked considerably longer hours than those claimed by SAVI. I now go on to consider the oral evidence and documents on this issue.

Agreements

[51] Looking firstly at the contractual documentation, Schedule 1 of the first employment agreement says:

The Employee will work 6 days per week (holidays and public holidays) to meet the Employer's business requirements. The Employer's operating hours are between the hours of 9.00am to 5pm, Monday to Friday, and 10.00am to 4.00pm on weekends.

[52] The operating hours specified in the first employment agreement, being seven days per week, are not surprising for a car yard.

[53] The second employment agreement sets the ordinary hours of work as between 9am and 5pm, and not exceeding 40 per week. The usual hours of work are also said to be 9am to 5pm. Under clause 5.1 the ordinary working hours shall be worked from Monday to Sunday "consecution days of the week" (presumably consecutive). Schedule 1 repeats that hours of work are 9 am to 5 pm which may be varied in accordance with clause 5.1.

The parties' evidence

[54] In both the statement of problem and his witness statement there are inconsistent references to Mr Gill's days and hours of work. Both documents refer early on to Mr Gill being required to work six days a week; from 9am to 5pm on Monday to Friday and 10am to 4pm on Saturday. Allowing for a half hour break each day I calculate that as amount to 43 hours work per week. I note that Mr Gill's arrears claim calculation allows for breaks.

[55] However, further on in both documents it is stated that Mr Gill worked on Saturday and Sunday (thus seven days a week) from an earlier start time of 9.30am to 4pm. His arrears claim is calculated on that basis, with him working 49.5 hours per week.

[56] At the investigation meeting Mr Gill said that he worked Monday to Friday 9am to 5pm, and Saturday and Sunday 9.30am to 4pm. He also said that when he started at SAVI he was told that he had to work six days a week but then he was told that he had to work seven days a week. However, the calculation of Mr Gill's arrears

claim was based on Mr Gill working seven days per week for the entire period of his employment.

[57] Later in his oral evidence Mr Gill referred to starting work usually around 9.30am, without reference to the weekend. Under cross examination Mr Gill said that the yard was open 9 am to 5 pm during weekdays and 9 am to 3 or 4 pm on Saturdays, with no mention of Sunday opening. He accepted that these were the hours he worked. He gave the same evidence under re-examination, thus saying that he worked six days a week.

[58] SAVI's statement in reply says that Mr Gill never worked more than 40 hours per week and "eventually" he worked only 30 hours or less. At the investigation meeting the company maintained that Mr Gill only worked 30 hours per week. However, when asked whether the \$500 flat rate in the first employment agreement complied with the minimum wage rate, Mr Sharma said the agreement between him and Mr Gill was that Mr Gill worked 20 to 25 hours a week. That was inconsistent with other evidence by Mr Sharma that he and Mr Gill had reached an agreement that Mr Gill would work 30 hours a week.

[59] Mr Sharma's evidence was that the yard was open from 9 am to 5pm Monday to Friday and 10am to 3pm on Saturdays. He said that the yard had just started opening on Sundays, which I took to refer to late 2017. Mr Sharma said that when Mr Gill occasionally had to work on Saturday, he would take a day off in the middle of the week.

[60] By contrast Ms Kaur said the yard was only open on Monday to Friday, but either she or Mr Sharma would go in on other days if appointments were made.

[61] Mr Sharma's position was that Mr Gill had actually worked less than 30 hours usually, but that he had been paid for 30 hours.

[62] There was an inconsistency in Mr Sharma's evidence regarding whether Mr Gill's actual work hours determined his pay, even under the second employment agreement. Mr Sharma said that he paid Mr Gill for the hours that he worked, and that staff get paid on their timesheets. However, he also said that Mr Gill sometimes worked less than 30 hours a week, sometimes only worked two hours in a day. His pay did not change though.

[63] Mr Sharma says that Mr Gill's money situation was tight, but maintained that although Mr Gill could have worked 40 hours per week, as provided in the second employment agreement, he chose not to.

[64] I did not find Mr Sharma's position on the hours of work issue credible.

[65] Ms Kaur said that Mr Sharma told her that Mr Gill was to work 30 hours per week. There was no mention to her of the prospect of him working up to 40 hours per week. In her witness statement Ms Kaur said that Mr Gill never worked Sundays and/or public holidays, leaving open Saturday work.

Timesheets/Weekly time records

[66] I now move to look at other documentation. SAVI filed with its statement in reply timesheets headed weekly time record. They have rows and columns for seven days of the week, times in and out, regular hours, overtime and total hours. However, all the documents have two diagonal lines across them with "30 hours" written between the lines. There are no individual entries for hours on particular days, or start and finish times.

[67] Other than the last couple of forms, the forms are mostly signed by Mr Gill, Ms Kaur and Mr Sharma (as director). The last couple are in a somewhat different format and only have provision for the employee and the manager to sign. They are signed by Mr Gill and Ms Kaur.

[68] Mr Gill said that after the Labour Inspector came Ms Kaur sat down with him and made him fill out retrospectively each sheet putting in the "30 hours" entry. He said that Ms Kaur told him that his visa would be cancelled if he refused to fill out the forms. He explains the use of different coloured pens by saying that Ms Kaur insisted on him changing pens during the process. He saw Ms Kaur sign the forms but did not see Mr Sharma sign them.

[69] Both Mr Sharma and Ms Kaur deny this.

[70] Ms Kaur said Mr Gill let her know how many hours he worked. However, the time sheets show a consistent recording of 30 hours per week every week. There

would seem to be little purpose in Mr Gill frequently reporting his work hours to Ms Kaur if they were consistently recorded as exactly the same.

Log book/s

[71] On 29 March 2017 Mr Gill's representative had sought wage and time records from SAVI. From at least May 2017 it was clear to SAVI that Mr Gill's case included a claim that he had worked considerably more hours than the weekly time records indicated and that he was seeking payment for the arrears. SAVI filed some of the timesheets with its statement in reply. The Authority directed that by 10 July 2017 SAVI lodge any additional time records which had not already been filed.

[72] It was therefore surprising towards the end of the second day of the investigation meeting on 19 December 2017 for Mr Sharma, under cross examination, to mention that Ms Kaur had records in a log book at the yard of hours worked. These had not previously been mentioned or filed. Concern was expressed on behalf of Mr Gill about the possible fabrication of records. Despite the Authority directing that the logbook/s were brought into the Authority by 20 December 2017 at 2pm, SAVI did not do this until 22 December 2017.

[73] Pages of the log book date from 4 January to 18 November 2016. These show start, finish and break times worked on specified days of the week. They show Mr Gill working on six hours a day Monday to Friday for most weeks in 2016. In what appeared to be weeks including public holidays, Mr Gill is shown as working 7.5 hours per day on four days of the week.

[74] When Mr Sharma first mentioned the log book on 19 December 2017 he said that yard managers at the different branches, such as Ms Kaur, kept the log book and filled it in for their time and sales staff's time. I took this to mean it was a company system.

[75] Ms Kaur gave contrasting evidence on 17 January 2018. She said that she had talked to Mr Sharma about the log book before the 28 September 2017 investigation meeting. Ms Kaur said that she kept the log book for her own records which she wanted to write down in case Mr Sharma asked for it. She described it as a "personal record".

[76] Ms Kaur's explanation for keeping the book, was not in keeping with what appeared to be Mr Sharma's relaxed approach of paying regardless of whether Mr Gill had worked the 30 hours that week or not.

[77] Ms Kaur acknowledged that Mr Gill had not seen the log book. When asked why it appeared to show Mr Gill working on days over Easter in 2016 she said maybe it was a mistake.

[78] When asked about Mr Sharma's evidence that Mr Gill sometimes worked less than 30 hours, Ms Kaur said that Mr Gill would make it up the next week. However, there is no indication of that from the log book, which shows a consistent picture six hour days, Monday to Friday.³ I did not find Ms Kaur's explanation to be credible which casts doubt on the authenticity of the information in the log book.

[79] That doubt was added to by Mr Sharma's evidence. He said on 19 November 2016 that the log book would show Mr Gill's actual hours which were less than 30 a week. However, the pages later provided from the log book show a consistent six hours worked per day, other than around public holidays.

[80] Mr Sharma's evidence was that Mr Gill occasionally worked on Saturdays and then took a day off during the week. That is not reflected in the log book. This gave me further cause to doubt the veracity of the log book information.

Other documents

[81] During the investigation meeting SAVI produced salary transactions records which showed payments made to staff for wages. It is unclear from the document whether these are gross or net payments. However, the amounts reflect those received in Mr Gill's bank account, so the figures appear to be net. Until after the last investigation meeting day, no records were filed by SAVI showing gross pay.

[82] The Authority then directed that SAVI provide its tax records regarding Mr Gill. However, the records provided only began for the month ending 30 April 2016 and not all monthly records have weekly calculations attached. Generally the weekly records show a net amount of \$428.89 being paid, but the gross amount changes from \$486.75 to \$505.54.

³ The only significant variation being in the periods around public holidays, as referred to above

[83] SAVI produced a number of toll road records showing use of a company registered vehicle. Mr Gill on occasions had use of a company vehicle, although he suggested that this was because he bought a car from SAVI which had problems and so was at least temporarily returned to the company, with him using other cars as courtesy vehicles.

[84] The toll road records which were from during Mr Gill's employment show him going through the northern gateway north of Auckland at 5.35pm on a Saturday (returning three and a half hours later), at 9.39 am on a Saturday (returning less than two hours later) and at 2.22pm on a Sunday (returning over five hours later).

[85] SAVI says that Mr Gill had a friend north of Auckland who he used to visit and that the times show he was not working the hours which he says he worked. Mr Gill accepts that he used to visit a friend but says on at least one occasion he was taking a car up north to deliver to a customer. I found Mr Gill's explanation credible.

[86] SAVI relies on the notes of Mr Gill's interview with a labour inspector on 20 October 2016, which he signed. Mr Gill is recorded as saying that he works from 9 am until 5pm, without specifying which days of the week. He says that sometimes he has two days off or one day off (a week). Mr Gill said his pay is banked, the rate was \$18 per hour, although he never got pay slips. However, if Mr Gill was working 9 am to 5 pm five days a week, he would have worked well over the 30 hour period which SAVI says he worked.

Other oral evidence

[87] I heard from the landlord of the yard's Papatoetoe premises. He operated his own business from another part of the same address. The landlord's business was closed on public holidays. He believed that SAVI should have notified him when they wanted to open on public holidays. No notification was received. However, SAVI were able to open their premises themselves, without the landlord doing so or being present. So I did not find the notification issue particularly helpful in determining whether the SAVI yard was actually open on public holidays.

[88] The landlord's business was open on Saturday mornings only in the weekend. His impression as that SAVI was sometimes open and sometimes closed in the

weekend. Similarly during the week the yard did not open at a set time. It usually opened around 9.30 or 10am. The landlord's business closed around 4.30 or 5pm. Sometimes the yard was still open when he finished but sometimes it had already closed.

[89] The landlord's evidence supported the business not having fixed start and finish times, but being open for the bulk of a normal business day and on at least some Saturdays.

[90] A man from a house where Mr Gill boarded whilst at SAVI gave evidence. He says that Mr Gill was usually not home on weekends and would occasionally mention in the weekend that he was working. His impression was that Mr Gill had a day off every three or four weeks. Mr Gill often left home in one car and came home in a different company car. This evidence provided some limited circumstantial support for Mr Gill's claim.

Conclusion on hours of work

[91] I do not find either party's evidence entirely satisfactory on the issue of the hours of work. The documents provided limited assistance.

[92] The consistency of hours in the weekly time record and log book present a strikingly different picture to the variability of hours for the yard described by the landlord, and by Mr Sharma and Ms Kaur regarding Mr Gill's actual work, including starting late and catching up the next week. In light of that and the other inconsistencies outlined above, I do not accept that the weekly time record or the log book present accurate information about Mr Gill's hours of work.

[93] I was urged to accept Mr Gill's evidence on hours of work on the basis of s 132(3) of the Act which states that the Authority may, where evidence of given of a failure to keep wage and time records, accept all claims made by the employee as proved. However, the difficulty in this case is that Mr Gill gave contradictory evidence regarding the hours and days which he worked. I am not prepared to accept his claim that he worked 49 hours a week over seven days as proven, when he himself said at different points that he only worked six days a week and less hours, than the 49 claimed.

[94] I proceed to determine the claim on the basis of the hours which Mr Gill was entitled to under his employment agreements. The first employment agreement does not have a figure for his hours of work. However, the Minimum Wage Act requires employment agreements to fix at no more than 40 the maximum number of hours to be worked in a week. The second agreement specifies that the ordinary hours of work shall not exceed 40 per week.⁴ In the absence of satisfactory evidence regarding an agreement to work any other period, I shall use the 40 hour figure for the whole period of Mr Gill's employment.

Mr Gill's pay

[95] Similar to the hours of work issue, the question of what Mr Gill was paid, particularly as regards gross pay, was not at all straightforward.

[96] Although some documentation was not consistent with this, the parties agreed that SAVI paid Mr Gill a net figure of \$428.89 per week. Mr Gill thought that he initially earned less money for about a month but he had been unable to obtain his bank records for that period because of changing banks. SAVI's IRD records did not cover the early period of Mr Gill's employment. His claim is calculated on him receiving \$428.89 per week and I will proceed on that basis.

[97] It was difficult to gain a reliable figure as to Mr Gill's gross pay. Mr Gill's arrears claim, filed with the statement of problem, was calculated on him receiving \$504.44 gross, although at the investigation meeting Mr Gill was not certain of what his gross pay was.

[98] Mr Gill said that he was not provided with payslips by SAVI. SAVI said that it was unable to access its payslips due to computer issues and also referred to previous difficulties with an accountant. It suggested at one point that Mr Gill's gross salary was \$540.00 from 18 May 2016.

[99] SAVI suggested, in a portion of a document attached to its closing submissions, that Mr Gill may have had a gross rate which was higher but deductions were made for earlier deductions of too low a rate of tax. I found this evidence unsatisfactory.

⁴ Clause 5.1(c) of the second employment agreement

[100] Most of the weekly tax records filed by SAVI show a net amount of \$428.89 being paid, but the gross amount changing from \$486.75 to \$505.54.

[101] When asked to explain the \$500 flat rate in the first employment agreement appearing to be below the minimum wage, at least without commission, Mr Sharma accepted that it was if 40 hours were worked. However, he said that Mr Gill was only supposed to work for 20 to 25 hours. That range is not consistent with the 30 hours which SAVI claimed Mr Gill was supposed to work.

[102] If Mr Gill had been paid \$500 flat rate for 20 to 25 hours that would equate to a top pay rate of \$25.00 per hour. Mr Sharma described the \$500 as a retainer, on top of which Mr Gill was entitled to commission, although he was not paid any commission. A rate of \$25 per hour seems like a high retainer for a business of SAVI's nature.

[103] Mr Sharma also said that the \$500 was the after tax (net) rate, although there is no evidence in Mr Gill's bank statements or SAVI's IRD records that Mr Gill actually received \$500 in the hand. I therefore disregard Mr Sharma's evidence in this regard.

[104] As regards the second employment agreement I note that even on the basis of the 30 hours per week which SAVI claims Mr Gill worked and was paid for, that gives an hourly rate of around \$16.80 gross, not the \$18.00 set out in that.

[105] Having looked at the IRD tax calculators I find the \$504.40 figure put up on Mr Gill's behalf to be a reasonably accurate gross figure.

Arrears of wages

[106] The lack of proper records available prior to the claim being filed made it difficult for Mr Gill's claim to be accurately calculated. Mr Gill claims that he was underpaid by \$15,642.20 gross during his employment with SAVI, which is based on him working 9am to 5pm Monday to Friday and 9.30am and 4pm on the weekends.

[107] The claim is calculated over three periods:

- From 13 December 2015 to 1 April 2016 when Mr Gill should have been paid the minimum wage of \$14.75. I take this to be on the basis of there being no hourly rate set out in the first employment agreement;
- From 1 April 2016 to 18 May 2016, at the increased minimum wage rate of \$15.25 gross per hour; and
- From 18 May 2016 to 30 November 2016 at the contractual rate of \$18.00 gross per hour.

[108] I make a few comments on that calculation approach. I accept the appropriateness of using the minimum wage rate until a contractual rate is agreed, given that the first employment specified a \$500 flat rate plus commission. No commission was paid. I have found that Mr Gill is entitled to payment for 40 hours a week, and at the minimum rate of \$14.75 per hour, the weekly pay should have been \$590.

[109] It was not clear why 18 May 2016 was specified as the time when that \$18.00 hourly rate started. However, both parties accepted 18 May 2016 as the applicable date, and I will use that in my calculations.

[110] I use the 40 hour a week figure for the whole period of Mr Gill's employment and the actual weekly pay of \$504.40, using the three stages identified on Mr Gill's behalf:

- From 13 December 2015 to 1 April 2016, Mr Gill should have earned \$9440 gross (16 weeks at \$590 per week). He actually earned \$8070.4 (16 weeks at \$504.40 per week). He is therefore owed \$1369.60 gross.
- From 1 April 2016 to 18 May 2016, at the increased minimum wage rate of \$15.25 gross per hour. Mr Gill should have received \$3094 (six weeks and two days at \$610 gross per week). He actually received \$3228.16. He is owed \$675.84.
- From 18 May 2016 to 30 November 2016 at the contractual rate of \$18.00 gross per hour. Mr Gill should have received \$20,160 (28 weeks at \$720 per week). He actually received \$14,123.20. He is owed \$6036.80 gross.

[111] Totalling up those figures, provisionally, Mr Gill is owed \$8082.24 gross in arrears of wages. However, Mr Gill has also sought payment of commission which he says that he was entitled to. Commission payments may be included in determining whether the minimum wage has been paid. Once I determine what commission, if any, is owing to Mr Gill, that amount should be deducted from the arrears owing to him.

Commission

[112] Mr Gill claims that he was entitled to commission on cars sold, that he sold around 10 cars in his time with SAVI but received no commission. SAVI initially said that Mr Gill sold no cars, at least prior to May 2018 when the entitlement to commission was removed in the second employment agreement. However, Mr Sharma accepted that Mr Gill sold one car in February 2016 but was not paid because he had not filled out the commission details. Ms Kaur said that friends of Mr Gill bought cars when he referred them. She took care of all the selling process.

[113] The first employment agreement states that the commission is \$250 per car although that is said to change depending on the car margin. As SAVI did not accept that Mr Gill had sold any cars, it provided no evidence regarding the margins of the cars which Mr Gill sold.

[114] Under the second employment agreement there is no mention of an entitlement to commission. Mr Gill's job title was changed from salesperson to assistant manager.

[115] Mr Gill says that he raised the commission issue with Mr Sharma, who said that he paid commissions every couple of months. He says that later Mr Sharma kept saying that they were checking how many cars were sold. After that Mr Gill says that Mr Sharma denied that they had had any discussion about commission.

[116] I found SAVI's claim that Mr Gill, who was employed as a salesperson at least for the first almost six months, actually sold no cars in the year that he worked for it, not to be credible.

[117] SAVI produced the Manager's Sales Report, for Alpha Cars which appears to be the name which SAVI traded under at some stage. The report appears to cover all

sales, but did not specify who had made the sale. A number of the cars were sold to other car dealerships, although there were sales to individuals recorded. In some cases only what appears to be a first or a surname was recorded.

[118] Mr Gill says that cars sold through the website were signed by Ms Kaur and thus would be recorded in her name.

[119] SAVI was critical that Mr Gill had not kept a book of his own sales, as other sales people did. He says that he had never been told that he needed to or supplied with a book for that purpose.

[120] Mr Gill says that sales were recorded as being through Ms Kaur as the yard manager and she signed the sale papers. Thus no sales were recorded in Mr Gill's name.

[121] Two of Mr Gill's friends gave evidence about purchasing cars from him. One of those friends bought two cars in different months in February and May 2016. The other friend purchased in April. The sales to both these friends are recorded the Manager's Sales Report. Mr Gill also identified another car on the records which he sold to a friend in February 2016. The May 2016 sale is before the date of 18 May 2016 which the parties agree was when Mr Gill was paid under the second employment agreement.

[122] Until the second employment agreement was entered into, Mr Gill was entitled to commission. That commission was \$250 unless otherwise specified by the company. No other rates were specified as SAVI did not accept that Mr Gill sold any cars. However, I find that Mr Gill did sell cars. There is evidence of four sales during the time he was employed under the first employment agreement. I accept Mr Gill's evidence that he sold about at least ten cars during his employment.

[123] Given that the second employment agreement did not specify commission, I award Mr Gill commission for the sale of four cars which he has established were sold to his friends in the period when he was covered by the first employment agreement. Within 28 days of the date of this determination SAVI is ordered to pay Mr Gill \$1,000.00 as commission on the same of five cars.

Adjustment to wage arrears figure

[124] Having found that Mr Gill was entitled to \$1,000 commission, I deduct that figure from the provisional wages figure of \$8082.24. Therefore SAVI is ordered to pay Mr Gill the sum of \$7082.24 gross within 28 days of the date of this determination, as arrears of wages.

Public holidays

[125] Mr Gill claims that other than Christmas Day 2015, he worked the remainder of the public holidays during his employment with SAVI.

[126] At the investigation meeting he acknowledged that on one day in March or April 2016, he thinks it may have been Easter Monday or Anzac Day, he came into work briefly but then Mr Sharma phoned around 11.30 am or 12 noon to say that he and Ms Kaur could go home. This was explained on the basis of a salesman based on the SAVI compliance centre saying that all the yards were closed. Under cross-examination, Mr Gill said that the yard opened all the public holidays except two or three. This may have been consistent with the shop trading hours legislation, which forbids trading on Christmas Day, Good Friday, ANZAC Day (until 1pm) and Easter Sunday, with limited exceptions which were not suggested to apply to the yard.

[127] SAVI denies that Mr Gill worked on any public holidays.

Entitlement

[128] The first employment agreement, under headings for annual holidays, public holidays, sick leave, bereavement leave and parental leave, says that they were “Not Applicable”. This appears to have been an attempt to contract out of the Holidays Act. However, this is ineffectual and the statutory provisions apply.⁵

[129] The second employment agreement provides time and a half and a day in lieu for work done on public holidays, in accordance with statutory requirements.

[130] SAVI relies on the notes from Mr Gill’s 20 October 2016 interview with the labour inspector where he says that he has never worked on a public holiday. Mr Gill

⁵ S 6(3) of the Holidays Act 2003

says that he was told not to make trouble at the interview so he said he did not work on public holidays.

[131] The company also relies on alerts which it received from the IMVIA ⁶, which the company suggested meant that as a member, it could not open the yard on public holidays. However, looking at the two alerts provided they only specify that trading is not permitted on Christmas Day, which Mr Gill says that he did not work on. I could see no reference to other days being specified. I do not find that this evidence assists SAVI.

[132] Ms Kaur said that the yard normally did not open on public holidays, but that she or Ms Sharma would go in for customers who wanted to see a car. She denied that Mr Gill had veer done that.

[133] There are instances in the Manager's Sales Report of a car being sold on public holidays. Mr Sharma explained this by saying Ms Kaur and himself can access SAVI's system from home and generate sales from there. He acknowledged that sometimes one or other of them went into the yard for an appointment on a public holiday.

[134] For the sake of completeness I refer to entries in the log book pages, even though I do not accept that they are genuine. Mr Gill appears to be shown as having worked on Auckland Anniversary Day, Waitangi Day, Easter Monday and Labour Day. In a couple of sections near other public holidays hours are noted only four days of the week but increased to 7.5 hours from the standard six hour, making the weekly total still 390 hours. Queen's Birthday has some hours written in but then scribbled over and "Day off" written. The log books do not cover Mr Gill's work prior to 4 January 2016.

[135] Submissions on behalf of Mr Gill note state that as SAVI failed to keep proper holiday and leave records as required by s 81 of the Holidays Act, and that made it difficult for the Authority to assess the claim, I should exercise my powers under s 83(3) and (4) of the Act and accept as proven Mr Gill's evidence about the days he worked and was not paid for.

⁶ Imported Motor Vehicle Industry Association

[136] I accept that Mr Gill did work on some public holidays.

Calculation

[137] For the 10 public holidays, Mr Gill claims a total of \$1704.88 for time and a half and \$1136.59 for days in lieu, or alternative days. However, given Mr Gill's evidence that the yard did not open on two or three public holidays, I will give SAVI the benefit of the doubt about whether it was open on days which the shop trading legislation forbids. I therefore deduct Good Friday and ANZAC Day from the days Mr Gill has claimed, leaving eight days.

[138] Mr Gill says that he only worked three hours on a day which I will take as Easter Monday 2016. Given that he appears to have been paid the ordinary weekly amount at that time, I consider that he has already been paid more than time and a half for working on part of that day, so remove that from the total, taking it to seven days for the additional half time claim.

[139] I now calculate the half time payment which Mr Gill should have received on top of the ordinary time payment for the days worked:

- Five of the public holidays fell in the period when the minimum wage was \$14.75. An additional half time payment of \$7.38 per hour for eight hours is \$59.04 gross. Seven days' worth of \$59.28 is \$413.28 gross.
- The other two public holidays fell when Mr Gill was on \$18.00 per hour under the second employment agreement. An additional half time payment of \$9 per hour for eight hours is \$72.00 gross. Two days' worth is \$144.00.

[140] Half time payments therefore total \$557.28. I order SAVI to pay Mr Gill \$557.28 gross for public holiday pay, within 28 days of the date of this determination.

[141] In terms of alternative days, Mr Gill is entitled to eight alternative days as Easter Monday was also worked. The applicable daily rate is that at the end of Mr Gill's employment.⁷ The relevant daily rate is \$144, being \$18 per hour for eight

⁷ S 60(2) of the Holidays Act

hours. I order SAVI to pay Mr Gill \$1152.00 gross for alternative days, within 28 days of the date of this determination.

[142] On the basis that Mr Gill will be paid at the minimum wage or contractual rate for working on the public holidays, I only award him arrears for the half time which he should have been paid on top of the basic rate, and also payment for a day in lieu.

Annual holidays

[143] Mr Gill claims holiday pay of \$3,289.76. Mr Sharma said at the investigation meeting that Mr Gill was on minus two days annual leave balance when he finished at SAVI. However, a payroll sheet later filed showed that as at 16 November 2016 Mr Gill was owed 3.47 days of holiday pay. There was no evidence of this amount being paid on termination. There were no payments made after termination at all.

[144] Mr Sharma says that Mr Gill had a week off on pay when there were visa issues, but records did not identify this period. He also referred to a payment he made to Mr Gill, although I am not satisfied that this was a payment for annual leave. The case was somewhat complicated by Mr Gill having bought a car from SAVI, but then driving courtesy cars when that car was returned for repairs.

[145] Ms Kaur did not recall Mr Gill having a week off on annual leave and was unable to remember him having any annual leave whilst at SAVI.

[146] Despite the Authority directing that SAVI provide records showing the actual days when Mr Gill took annual leave and Mr Sharma saying that such records existed, no such records were provided by SAVI. The Holidays Act requires employers to keep records which show, amongst other things, the dates on which annual leave was taken.⁸ Even if I had been satisfied that the weekly time records or log books were genuine, they would not have helped SAVI as they do not show annual leave being taken, possibly other than a half day when Mr Gill is noted to have finished early.

[147] Mr Gill's claim for annual leave is \$3289.76 gross. This is based on a calculation of his total earnings entitlement of \$41,122.04 gross. However, the arrears ordered are less than Mr Gill has claimed so I will undertake my own calculation.

⁸ S 81(2)(g) of the Holidays Act

[148] Given SAVI's lack of records regarding which days, if any, Mr Gill took annual leave, I accept that he should be paid 8% of his total gross earnings as holiday pay. The figure provided by Mr Gill for actual wages for the entire period of employment was \$25,479.84 gross. In addition I have ordered that he be paid arrears of \$7082.24, making the total wages for calculation of annual leave holiday pay \$32,562.08 gross.

[149] I order SAVI to pay Mr Gill the sum of \$2604.97 gross for holiday pay within 28 days of the date of this determination, being 8% of \$32562.08.

Penalties

[150] Penalties are sought for SAVI's breach of the Minimum Wage Act in failing to pay the minimum wage, and failure to keep time and wage records, breaching s 130 of the Employment Relations Act. No penalty was sought regarding the Holidays Act. I did not receive substantial submissions on the penalty issue.

Minimum Wage Act

[151] My finding in relation to the wage arrears claims also established that SAVI breached s 6 of the Minimum Wage Act. The award of a different total arrears amount than Mr Gill claimed, does not negate that.

Time and wage records

[152] A penalty is also sought for SAVI's failure to maintain proper time and wage records as required by s 130 of the Employment Relations Act. That section sets out a list of what the record must contain. Although Mr Sharma said that the company had all the records it was supposed to have, none of the documents filed complied with all the items specified in s 130 of the Act. Of particular significance was the failure to have a record, other than the log book which I do not accept contained genuine information, of the number of hours worked each day. I find that SAVI breached s 130 of the Act.

Calculation of appropriate penalty

[153] I now undertake the four step test for determination of the appropriate penalty, as set out in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd (Preet)*.⁹

Step One – nature and number of breaches

[154] There are two breaches of different pieces of legislation regarding one employee. The maximum penalty for a breach of both Acts by a company is \$20,000.¹⁰ This gives a provisional figure of \$40,000. I do not consider that these two breaches are appropriate matters to globalise as they are distinct.

Step Two – severity and mitigation

[155] I now look at the severity of the breaches considering aggravating factors, and then any mitigating factors involved.

[156] Failure to pay the minimum wage is a serious matter. The discrepancy between the minimum wage and what Mr Gill received was not insignificant. The first employment agreement arrangement of a flat rate plus commission is not uncommon for sales roles and had sales occurred and commission been paid there was the potential for payment above the minimum wage to have occurred. The second employment agreement provided for an hourly rate which was well above the minimum wage rate, however, payment was not made.

[157] The time and wage record issue could be seen as less serious but actually caused significant complications in the bringing, hearing and determination of Mr Gill's claim.

[158] Both breaches continued throughout Mr Gill's employment.

[159] In terms of aggravating factors Mr Gill is a migrant worker, whose visa from May 2016 was dependent on his position with SAVI. He gave evidence that he was treated in a worse manner to employees in another part of the business who were not in the same visa situation.

[160] Mr Gill says that as he was not being paid the minimum wage he could not help to support his family in India. He had to take out loans and struggled to pay for

⁹ [2016] NZEmpC 143

¹⁰ S 135 (2)(b)

his accommodation. He had to move out of his flat at one point because he could not afford to pay the rent.

[161] My finding that both the timesheets/weekly time records and the log books did not contain genuine information regarding Mr Gill's work is an aggravating factor.

[162] In terms of mitigating factors, the situation is of relatively short duration as Mr Gill's employment lasted less than a year. There was some evidence that not all employees were affected.

[163] SAVI made some attempts to co-operate with the Authority's process and produced some of the documents directed. I am not aware of any other minimum employment standards actions which SAVI have been involved in.

[164] I assess the Minimum Wage Act breach at 40% (\$8,000) and the Employment Relations Act breach at 30% (\$6,000), giving a provisional total of \$14,000.

Step Three – ability to pay

[165] There was some witness evidence, including from Mr Gill, of the state of the business declining in the time when he was there. No financial accounts were provided but I was able to gain some information about the statement of the business from the company's bank accounts.

[166] I am prepared to make some deduction for ability to pay but am constrained from doing more by the absence of financial accounts. I reduce the provisional total to \$10,000.

Step Four – proportionality

[167] I now assess whether the provisional penalty of \$10,000 is proportionate to the seriousness of the breaches and harm occasioned by them. Mr Gill is owed a not small amount of money in arrears.

[168] I consider that there is a need for both punishment and deterrence of SAVI and deterrence of others. I do not consider that there is particular need for the penalty to compensate Mr Gill as he has already been awarded payment regarding his wage arrears claim.

[169] I have also considered whether the penalty is consistent with those awarded in other cases. Standing back and looking at all of the factors and considering whether a penalty of \$10,000 would be right in all the circumstances, I find that a reduction is needed, to \$8,000.

[170] I order South Auckland Vehicle Imports Ltd to pay a total penalty of \$8,000 to the Employment Relations Authority at Auckland (for payment into a Crown bank account).

Referral of determination

[171] Given concerns raised about the documents supplied by SAVI to the Labour Inspectorate, I direct that a copy of this determination is provided to it.

Remedies for personal grievances

[172] I now turn back to the issue of what remedies Mr Gill should get for his two unjustified warnings and unjustified dismissal.

Lost wages

[173] Mr Gill claims 13 weeks (three months) lost wages following the dismissal, which are calculated at \$891.00 per week. The total lost wages claim is \$11,583 gross.

[174] Mr Gill says that he found other work but not until around mid-2017. He says that although Mr Sharma had said he would not cancel Mr Gill's visa, when Mr Gill told Immigration New Zealand that he had been dismissed, his visa was cancelled. This made it very difficult for him to find work.

[175] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration, subject to a reduction for contribution by the employee to the situation.

[176] The weekly rate claimed on Mr Gill's behalf is based hours of work which I am not satisfied were undertaken, as set out in the Hours of Work conclusion. I based Mr Gill's arrears of wages award on a 40 hour week and consider that also to be appropriate for the calculation of the lost wages remedies for unjustified dismissal.

[177] A 40 hour week at \$18.00 equates to a weekly pay of \$720.00. Thirteen weeks of \$720.00 equals \$9360.00. That would be the appropriate remedy subject to a consideration of contribution below.

[178] I now consider Mr Gill's claims for compensation for humiliation, loss of dignity and injury to feelings. There was little evidence regarding the effects of the warnings on Mr Gill. I make a global award for the warnings and the dismissal. Mr Gill gave limited evidence on the effects of the dismissal on him, despite questioning. He said that felt humiliated. He said that he suffered financial hardship as a result of having no income. I consider that Mr Gill would be entitled to \$3,000 before a consideration of contribution.

Contribution

[179] SAVI says that Mr Gill contributed to his dismissal due to performance, behaviour and attendance, punctuality, breach of policy and complaints from customers. As the evidence focused on the disciplinary action and dismissal being undertaken regarding car grooming, I will focus on that. SAVI says that car grooming was within Mr Gill's role.

[180] The job description in the first employment agreement refers checking cars and waterblast (cars) when needed. I accept that grooming is a more extensive process, but they are related. The assistant manager job description is more focused on administrative tasks, but does refer to other duties as assigned. Both employment agreements refer to the employee undertaking other duties reasonably incidental to his position or other duties within his capabilities.¹¹

[181] I consider that it was not unreasonable to require a car sales person or an assistant manager at a small car sales yard with few employees, to undertake car grooming. The employment agreements envisage other tasks and I consider car grooming to be reasonably incidental to the sales role and within Mr Gill's capabilities, in accordance with the second employment agreement.

¹¹ Clause 6.1 of first employment agreement and clause 3.2 of second employment agreement

[182] In order to make a deduction for contribution I must be satisfied that Mr Gill's actions must be both causative of the outcome and blameworthy¹².

[183] Mr Gill was not happy at having to undertake car grooming, which he did not see as part of his job. He clearly preferred that it was done externally. I accept that he was undertaking that work most reluctantly and was not undertaking it to a reasonable standard on occasions. Although it was suggested that the car grooming was too much on top of other work, it was at SAVI's discretion to make the grooming a higher priority to other tasks.

[184] I find that Mr Gill's performance was causative of both the warnings and the dismissal and was blameworthy. I consider that a 60% reduction should be made for contribution. I therefore order that within 28 days of the date of this determination SAVI is to pay Mr Gill \$3,744.00 gross as lost wages and \$1200.00 as compensation under s 123(1)(c)(i) of the Act.

Costs

[185] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Gill shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. South Auckland Vehicle Imports Ltd shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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

Nicola Craig

Member of the Employment Relations Authority

¹² *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]