

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 439
5344699

BETWEEN JOHN THOMAS HAWKER
 Applicant

AND TEAM MCMILLAN LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: D Erickson, Counsel for Applicant
 S Langton, Counsel for Respondent

Investigation Meeting: 1 July 2011 at Auckland

Submissions Received: 13 July 2011 and 1 August 2011 for the Applicant
 25 July 2011 for the Respondent

Determination: 10 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hawker claims that he was constructively dismissed on 23rd March 2011 and that the dismissal was unjustified. Mr Hawker also claims that his employment was affected to his disadvantage by an unjustified action by his employer due to the suspension from his employment on 21st March 2011. He asks the Authority to find that he has a personal grievance (or grievances) and award him the remedies of reinstatement to his previous position, reimbursement of lost remuneration, and compensation of \$20,000; pursuant to section 123 of the Employment Relations Act 2000. The respondent, Team McMillan Limited denies the claims of Mr Hawker and says that the actions of the employer were justified in the circumstances.

[2] In addition to the evidence of Mr Hawker (including a sworn affidavit and a written witness statement), the Authority has received evidence for the respondent

from: Ms Holly Jones, Mr Ian Gibson, Mr Andrew McMillan, Mr Gavin Penfold, Mr Stephen Blay and Mr Nicholas Appleton. Both parties have provided relevant documents and comprehensive submissions. All of the evidence and material provided has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background facts and evidence

[3] Team McMillan Limited (TML) owns and operates a luxury motor vehicle dealership, commonly referred to as Team McMillan BMW. The business retails new and used motor vehicles; primarily of the BMW brand.

[4] Mr Hawker commenced his employment with TML on 20th October 2008, in the role of Business Manager – New Vehicles. He was then one of two business managers. Following a restructure, Mr Hawker became the sole business manager. The position involves the direct negotiation of finance and insurance arrangements for clients who are purchasing vehicles, with a particular focus on arranging finance agreements that satisfy the requirements of each client, as well as meeting the terms and conditions required to obtain the approval of the finance company. The preferred finance company for TML is BMW Financial Services New Zealand Limited (BMW FS). On the evidence available to the Authority, it is obvious that in some circumstances, the overall finance arrangement that is arrived at requires the exercise of some considerable skill and judgment, in order to complete a sale while also meeting the security criteria of the finance company.

[5] Mr Hawker was obviously very competent at performing his role, as evidenced by the fact that his base salary of \$45,000 was a minor component of his total remuneration of \$290,000 per annum. TML receives a commission on the finance arrangements made with the finance company and Mr Hawker earned a share of that commission, as well as a percentage of the profit derived from his contribution to the income of TML.

First concerns

[6] Mr Ian Gibson is the Sales Director for TML. Mr Hawker reported to him. Mr Gibson's evidence is that in September 2010, TML became aware of "*a number of issues*" that the BMW FS people had in regard to Mr Hawker. Mr Gibson says that

the issues included the deterioration of Mr Hawker's relationship with individual members of the BMW FS team and his "*poor execution*" of documentation, including not providing adequate information about the "*creditworthiness*" of customers. A meeting was held on 10th September 2010 between two BMW FS managers; Mr Andy Follows – General Manager, and Mr John Blay – Operations Manager; and Mr Gibson and Mr Hawker. Mr Gibson says that the purpose of the meeting was to improve communication between Mr Hawker and the BMW FS team. It appears that the meeting did not resolve the matters at issue and on 5th November 2010, Mr Gibson received a formal complaint from Mr Follows. While the letter of complaint does not specifically mention Mr Hawker, it refers to:

Repeated omissions, inaccuracies, misunderstandings and failures to follow process over time, have led to a pervasive doubt about the integrity of the information provided. Equally, I have grave concerns about the manner in which BMW Financial Services is being represented to our mutual customers. I believe that there is no longer sufficient mutual trust and respect between the operating teams for a successful partnership.

[7] Mr Gibson commenced a disciplinary process, as recorded in a letter to Mr Hawker dated 18th November 2010. There is a comprehensive response (7 A4 pages) from Mr Hawker. The outcome of the process was that Mr Gibson wrote to Mr Hawker on 2nd December 2010, setting out the disciplinary meeting conclusion. Mr Gibson informed that it was decided not to reach any conclusions in relation to the allegations, with the preference being to see if it was possible to mend Mr Hawker's relationship with BMW FS. However, Mr Hawker was informed:

In that regard, you need to improve on the accuracy of information and documentation you are required to complete. You need to ensure full disclosure of information in support of finance applications. You must comply fully with NZ consumer law. The C.I.N notice omissions we wrote to you about are an example of your poor execution of documentation. You know what is expected of you and the standard of this documentation would itself amount to misconduct, possibly serious misconduct. We also require a marked improvement in collection of monies due on delivery and improved focus on vehicle debtors. You are required to become more team orientated and participate more with sales meetings throughout our vehicle departments.

We will review the state of your (and therefore our) relationship with BMW Financial Services in three month's [sic] time, specifically to assess if you have been able to restore it, and therefore enable your continuation of employment. You can be assured you will be provided with any support you require to enable you to carry out your duties and continue to be responsible for our finance and insurance department. I will also be putting in place steps to monitor the relationship during that period and I will communicate these to you.

In the meantime, as mentioned above, we will hold off on any decisions regarding disciplinary action, and we hope this can be avoided going forward. You should be aware that if matters get worse or you do not take the necessary steps to correct the foregoing matters, or there is any unacceptable conduct on your part, I will revisit the disciplinary matters, and your employment may be in jeopardy.

[8] Mr Gibson also sent an email to Mr Hawker and Ms Holly Jones on 2nd December 2010. This set out particular undertakings that were to be put in place to prevent further relationship problems with BMW FS. The evidence of Mr Gibson is that:

John was under no illusion of what was expected of him and of the importance of ensuring that accurate information was provided on all finance applications. It went without saying that misrepresentations on finance applications would be a serious matter.

[9] The evidence of Mr Hawker regarding the outcome of the disciplinary process is that:

I took TMBMW's concerns seriously and made a concerted effort to ensure the concerns that had been raised with me were addressed. I understood that if I did not perform to the company's satisfaction, my job could be in jeopardy.

[10] Mr Hawker referred the Authority to circumstances that arose in early March 2011 and says that his actions at that time, were an example of him being conscious of ensuring that that he acted appropriately at all times, regarding the relationship with BMW FS. Mr Hawker gave evidence about his conflict with the BMW FS underwriter [S] and receiving support from Mr Gibson in relation to this, as evidenced by an email dated 8th March 2011, from Mr Gibson to BMW FS management:

Please review the emails below. I was involved in this transaction as the deal was falling over and was with John when he spoke to [S]. As far as I am concerned John's conduct was absolutely professional and respectful in trying to put right a situation that was beyond our control at the last minute (Client couldn't provide financials) and as he owned a \$3M house in Remuera with only \$1M mortgage, as well as a successful business [XXX]¹ and proved he had over \$1m dollars in his overseas bank, I consider this transaction certainly worthy of not letting go too easily. [S] wanted \$20,000 deposit to do the deal which is a bit onerous in my opinion.

I don't want John to have to walk on egg shells when dealing with FS and as you will see from his email to me last night maintaining the relationship is always foremost in his mind. Perhaps the two of you could have a look at the transaction and let me know if you think that we should have just let it go or if it was worthy of an appeal.

John should never feel guilty for trying to get a deal approved as this is what he is paid to do and it's up to FS to accept or decline at the end of the day, not John. John

¹ While it has not been sought by either party, the identity of TML clients or other individuals not directly involved in these proceedings, has not been revealed at the discretion of the Authority; in the interests of reasonably protecting their business and personal privacy.

is simply doing his job and I am surprised at the lack of respect shown in [S's] email considering what John, Bob and I have been through recently with FS.

[11] The evidence of Mr Hawker is that this email was not well received by BMW FS and it is his view that it had a “*particularly negative effect*” on the relationship between TML and BMW FS. Mr Hawker appears to suggest that there was some residue from this carried over to the subsequent events that led to the termination of his employment.

The events leading to the termination of Mr Hawker's employment

[12] On 14th March 2011, a customer, Mr [O], arrived at the TML dealership and met with Ms Holly Jones, the current Business Development Executive for TML, to finalise the finance arrangements for a new BMW X5 vehicle he had purchased. It became obvious that there was some confusion about the deposit that was to be paid. As Mr Hawker was on holiday, Ms Jones came to discuss the matter with Mr Gibson. Mr Gavin Penfold, the Floor Sales Manager for TML, also became involved. As Mr Gibson did not wish to upset Mr O further, he instructed Ms Jones to go ahead and process the paperwork for the BMW X5, while he looked into the matter further.

[13] The evidence of Mr Gibson is that on the same day (1:52p.m.), he received an email from Mr Steve Blay, the Operations Manager for BMW FS. Mr Blay advised of “a few issues/concerns regarding some deals” (four) that Mr Hawker had presented to BMW FS for approval. One of the concerns expressed by Mr Blay related to the deal involving Mr O. Mr Gibson attests that he carried out a preliminary investigation regarding the four deals in question and following the review of them, he was not concerned about two. But Mr Gibson says that he was concerned about the Mr O matter and one other; a deal involving Mr [H] and the purchase of a Range Rover vehicle.

The Mr O BMW X5 deal

[14] The evidence of Mr Gibson is that:

When I calculated the available profit margin on the deal I could see something was not right. I asked Gavin [Mr Penfold] to explain the deal to me. The paperwork showed that the X5 had been sold to Mr O by Gavin Penfold for \$169,940. This represented the full retail price of \$165,840 plus accessories. Gavin explained however that a total discount of \$12,000 had been provided on the purchase price and that what Mr O had actually paid for the car was \$157,840. Mr O had applied

for finance to purchase the vehicle. On the application form to BMW FS, John [Mr Hawker] had also represented that Mr O was paying a \$20,000 deposit. I knew from Gavin that he had only paid \$8,000. The \$12,000 discount which had been offered on the sale price appeared to have been converted by John into additional deposit. The finance had been approved by BMW FS on the basis of these false representations.

[15] Mr Gibson says that the deal was “*outside the norm*” in regard to such transactions and Mr Hawker had not sought approval from him to structure the finance in the manner advanced to BMW FS; as is required for any deals that are outside the normal parameters. Mr Gibson says that he would not have approved such an arrangement in any event.

The Mr H Range Rover deal

[16] Mr Gibson attests that this deal was more complicated as TML did not sell a vehicle in this transaction. Rather, TML had agreed to purchase Mr H’s BMW X5 and acted as a broker for finance for Mr H to purchase a Range Rover, and settle his remaining debt on the BMW X5. Mr Gibson says that the paperwork appeared to show that TML had negotiated to sell Mr H a second hand Range Rover and to trade in his BMW X5 (the X5). Mr Hawker had put together a finance application for Mr H to submit to BMW FS, but this was not approved and the Range Rover was sold to another customer. It then seems that Mr H found a Range Rover to purchase on Trademe and negotiated to buy it from a third party for the sum of \$72,000. TML then agreed to purchase Mr H’s X5 for the sum of \$18,000. The X5 was still subject to a finance agreement between Mr H and BMW FS whereby he still owed \$22,806.59 and with the difference between that sum and the sum TML agreed to pay for the X5 (\$18,000), Mr H was required to pay \$4,806.59 to clear the debt owing to BMW FS on the X5. Therefore, Mr H wanted TML to arrange finance for him to purchase the Range Rover (\$72,000) and also the debt owed to BMW FS (\$4,806.59). Mr Hawker was responsible for preparing the finance proposal to go to BMW FS.

[17] The evidence of Mr Gibson is that in the finance proposal for Mr H, Mr Hawker informed BMW FS that:

- (a) The price that TML was paying Mr H for his X5 was \$25,900. In actual fact the price offered was \$18,000, hence Mr Hawker had overstated the figure presented to BMW FS by \$7,900.

- (b) The purchase price for the Range Rover was \$79,900. In actual fact it was \$72,000, hence Mr Hawker had overstated the figure presented to BMW FS by \$7,900.
- (c) The deposit being paid by Mr H was \$10,000. This was an overstatement of \$4,300.

Mr Gibson says that the finance for Mr H was approved by BMW FS on the basis of the above misrepresentations made by Mr Hawker. Mr Gibson also says that his approval was not sought in relation to this transaction and he had not been notified by Mr Hawker about the manner in which the deal had been represented to BMW FS.

The Disciplinary Process

(a) Meeting on 21st March 2011

[18] On the basis of what Mr Gibson had discovered pertaining to the circumstances applying to the Mr O deal and the Mr H deal, Mr Gibson prepared a letter dated 21st March 2011, which he gave to Mr Hawker upon meeting with him on this day. Mr Hawker was given notice of a requirement to attend a disciplinary meeting the next day. The issues to be discussed were set out thus:

1. That you misrepresented to FS [BMW FS] a transaction involving an X5 vehicle, from which you personally benefitted. We understand that the retail price on the vehicle was \$165,840, and you sold it to [BOC] at a discounted price of \$153,840. The customer provided \$8,000 deposit. However, we understand that you misrepresented to FS that you had sold the vehicle for the full retail price (\$165,840), and that the customer had provided a total deposit of \$20,000. FS approved finance in reliance on that misrepresentation. Our concerns are:
 - a. You deliberately misrepresented the deal to FS.
 - b. If you had not misrepresented the deal to FS, the deal would not have been approved as there was insufficient cash deposit.
 - c. You have personally benefitted from the misrepresentation as you have received a greater profit on the deal than:
 - i. you would have received if FS had refused to finance the deal and the deal had not have gone ahead; or
 - ii. you would have received had you not misrepresented the deal and FS required further cash deposit to be paid.
 - d. Your conduct puts our company's reputation and relationship with FS at risk, which could have severe consequences for the company.

2. That you artificially inflated the price of the trade-in (X5) and the sale price of a 2007 Land Rover Range Rover in the [H] deal. FS has told us that you forwarded them an email that you sent to the customer, which set out that you had submitted the deal to FS with the sale price of \$79,900 for the Range Rover and a trade-in value of \$25,900 for the X5. This was as opposed to the real price of the Land Rover vehicle being \$72,000 and the real value of the X5 being \$18,000. You stated to the customer that this would provide the additional \$5,700 required to make up the \$10,000 deposit that FS required on the deal. Our concerns are that:
 - a. You have deliberately and dishonestly inflated the amount of the trade-in value on the X5 and the sale price of the Land Rover Range Rover to inflate the deposit so that FS would provide finance on the deal;
 - b. When Nick at FS asked you about this, you said it was for Fringe Benefit Tax purposes for the customer, but FS believes that this is untrue as the customer would have a greater Fringe Benefit Tax benefit from the lower price of \$72,000 rather than the higher price of \$79,900; and
 - c. Your conduct again puts our company's reputation and relationship with FS at risk, which could have severe consequences for the company.

Our concerns are that the above issues have, or may, result in your (our) relationship with FS deteriorating to untenable levels, such that they no longer have trust and confidence in you or us. Additionally, the allegations involve dishonest misrepresentations and conduct, which we consider could amount to serious misconduct and mean that we no longer have trust and confidence in your abilities to perform your role as a Business Manager with us.

[19] Mr Hawker was cautioned that disciplinary action up to and including dismissal may result. Relevant to the claim of unjustified disadvantage, Mr Hawker was also advised that:

Given the seriousness of the allegations, we propose to suspend you from work from today (Monday 21 March) on pay while we investigate these matters. The suspension would be pursuant to clause [6.6] of your employment agreement. Please let [sic] know if you agree to stand down, or if you have any other feedback on being stood down. If you do not agree to standing down, I will consider your reasons before making a decision on whether to proceed with the suspension.

Clause 6.6 of the employment agreement provides that:

Where the Company considers it appropriate, it may require you to undertake reduced or alternative duties or remain away from work, on suspension, but on full pay, while it conducts an investigation into your conduct as an employee, or your performance. Where any suspension extends beyond two weeks due to matters beyond the Company's control (such as a police investigation into your conduct) the suspension may continue without pay.

[20] The evidence of Mr Hawker is that he came back from being on leave for a week and was "*shocked*" to be given the letter referred to above by Mr Gibson. Mr Hawkins says that he thought that his relationship with BMW FS had gone "*very*

smoothly.” Mr Hawker also attests that the two deals being questioned were “*in accordance with usual company practice which had been authorised in the past.*”

(b) Suspension from employment

[21] The evidence of Mr Gibson is that during his meeting with Mr Hawker on 21st March 2011, he proposed the suspension of Mr Hawker from his employment and asked him for his comments about this proposal. Mr Gibson attests that the response of Mr Hawker was that he was “*disappointed*” about this “*but that he understood my reasons.*” Conversely, the evidence of Mr Hawker is that while he accepts that the matter of suspension was set out in the letter given to him (21st March 2011), Mr Gibson did not: “*personally explain to me what my suspension would actually mean or why it was necessary that I be suspended.*” Mr Hawker also says that after he met with Mr Gibson and received the aforementioned letter, he returned to his office to continue with his work. Mr Gibson then came to his office and notified him that he was suspended and that Mr Hawker was required to leave the building. But Mr Gibson says that this is not correct. The evidence of Mr Gibson is that Mr Hawker was informed of the suspension at the meeting in Mr Gibson’s office. Mr Gibson then observed that Mr Hawkins returned to his office and “*sat there for about 30 or 40 minutes. As he was taking a long time to leave, I went into his office and asked him to leave immediately.*” On balance, I find the evidence of Mr Gibson to be the more probable version of the events and that the suspension of Mr Hawker took place in Mr Gibson’s office. I conclude that while Mr Hawker may not have been entirely satisfied in regard to the necessity for the suspension, he did not dispute or challenge the validity of it.

(c) Meeting on 22nd March 2011

[22] Mr Hawker and Mr Gibson met again on 22nd March 2011. Mr Hawker presented comprehensive written responses (five A4 pages) to the allegations against him. The evidence of Mr Hawkins is that he explained to Mr Gibson that it was Mr Penfold whom had been responsible for structuring the deal involving Mr O. Mr Hawker attests that he understands that Mr Penfold was only able to secure the sale to Mr O because TML agreed to pay \$12,000 of the \$20,000 that was required for the deposit on the new BMW X5. Mr Hawker says that later that day, at the request of Mr

Gibson, he forwarded an email from Mr O, which was his response to a variety of questions posed to him by Mr Hawker. Mr Hawker says that the email from Mr O confirms that the finance structure had been negotiated by Mr Penfold. It is the belief of Mr Hawker that Mr Gibson did not consider this information. But Mr Gibson says that he found the email received from Mr O to be “*unclear*” in that on the one hand, Mr O seemed to be saying that Mr Penfold had agreed to the discount of \$12,000 on the sale price of the car, but on the other hand, Mr O seemed to believe that Mr Penfold was going to pay the \$12,000 towards the deposit. Mr Gibson adds that Mr Penfold did not have the authority to agree to such course of action. The further evidence of Mr Gibson is that Ms Jones informed him that her experience of dealing with Mr O was that, Mr O interchanged the words “discount” and “deposit.” Mr Gibson came to the conclusion that Mr O had “*not understood what was happening*” hence he did not “*put too much weight*” on the communication from Mr O.

[23] The evidence of Mr Gibson is at odds with that of Mr Hawker. Mr Gibson acknowledges that Mr Hawker said that the Mr O deal was agreed to by Mr Penfold and that in regard to the structure of the finance application to FS, he [Mr Hawker] was simply carrying out what he had been told to do by Mr Penfold. However, Mr Gibson says that he had already spoken to Mr Penfold (and Ms Jones) prior to meeting with Mr Hawker, but given the latter’s explanation, he spoke to them again. Mr Gibson also had a written statement from Mr Penfold. In this statement, Mr Penfold gives a reasonably detailed explanation of his involvement in the Mr O deal, and his interaction with Mr O and Mr Hawker, in bringing it about. Mr Penfold explains (in substance):

John had spent approximately 30-45 minutes with the customer in the office before coming to me on the showroom floor with the customers behind him. John informed me that the customer was going to consider the deal but needed some time to think about this, because they had calculated that they would want to put in 20k deposit to allow for lower rental payments. John asked if I was prepared to give some financial assistance towards the deal as I had not yet given any. I suggested that I could help with 10k, this motivated Mr O to consider purchasing the X5.

I suggested we go into John’s office as my desk was being occupied and try to close the deal. John was present at some stages of the negotiation. After 10-15 min of discussion on the product and X6 options, timing etc; I asked the customer for a \$10k deposit to secure the deal. Mr O was not happy paying so much money so far in advance. I made the suggestion of a further 2k discount to compensate for his “inconvenience” of having to lose some money in interest and good faith in having a deal done on the day. I was aware that this would be going on the deposit, along with the 10k I had given John to make up the \$20k deposit. I was unaware that John would, when doing the final paperwork, use this assistance for a deposit, but rather towards discount as this would have brought the payments down; which I understood

was the desired goal. I was not aware that this would be used to strengthened [sic] the customer application submitted to the finance company.
I was not concerned on how the deal would be structured as this would be the sole responsibility of the Finance department as John would have been aware of how this needs to be presented to the finance company.

Not surprisingly, the evidence of Mr Penfold is largely consistent with the content of the written statement.

[24] The evidence of Mr Gibson is that after obtaining Mr Penfold's explanation, he was not sure of how aware Mr Penfold was, in regard to how Mr Hawker planned to represent the discount that had been offered to Mr O, in order to obtain the finance. But then Mr Gibson attests:

However, I was satisfied that it was John who made the decision to "convert" the discount into a deposit and represented the discount as such to BMW FS.

Mr Gibson also says that sales staff (such as Mr Penfold), do not have authority to structure finance arrangements or to prepare finance applications for customers; this function is the responsibility of the Business Manager, and that Mr Hawker and Mr Penfold know this. In response to a question posed to him by Mr Erickson, Mr Gibson acknowledged that an outcome of his investigation was that, he accepted Mr Penfold's version of events rather than that of Mr Hawker.

[25] In regard to the Mr H deal, the evidence of Mr Gibson is that at the 22nd March 2011 meeting, he was told by Mr Hawker that this was the responsibility of Mr Andrew McMillan, the Car Sales Manager for TML. Mr Gibson says that he spoke to Mr McMillan who was "adamant" that his involvement in the Mr H transaction was limited to agreeing to a price on the used BMW X5. This is consistent with an email dated 21st March 2011 from Mr McMillan to Mr Gibson; thus:

We sold the vehicle he [Mr H] was looking at with us prior to the finance being approved. He subsequently found a private sale and upon my return from annual leave asked if we could trade his X5 and assist in the finance. I was able to confirm that we could still give him \$18,000 for his trade and directed the finance to John to broker.

The evidence of Mr McMillan is in a similar vein. He says that:

As far as I was concerned, it was John's responsibility to arrange the finance. This was outside my role and my authority which is why I had put Mr [H] in touch with John in the first place.

[26] The evidence of Mr Hawker, pertaining to the Mr H deal, is that the details of the transaction were “*thoroughly understood*” by Mr Gibson and Mr McMillan and it was also “*explained in detail*” to BMW FS prior to their approval. But the evidence of both of these witnesses is clearly to the contrary. Mr Hawker also makes reference to the involvement of Mr Nicholas (Nick) Appleton, the New Business Executive for BMW FS. In his evidence Mr Appleton refers to an email that he (apparently accidentally) received a copy of, that had previously been sent by Mr Hawker to Mr H. The germane content being:

I submitted the car at \$79,900, the trade in would be shown as \$25,900 (as opposed to \$72,000 and \$18,000 trade in). This give [sic] equity of \$4,300 after the settlement of \$21,600 is cleared, requiring \$5,700 additional deposit to make up the \$10,000 required in the BMW quote.

Mr Appleton attests that the content of this email raised some concerns for BMW FS and as a consequence, he contacted Mr Hawker, who explained to him that Mr H wanted the lower figures (\$72,000 for the Range Rover and \$18,000 for the X5) submitted for fringe benefit tax purposes, but Mr Hawker confirmed to Mr Appleton that the higher figures (\$79,900 and \$25,900) were the correct ones. Mr Appleby says that he accepted Mr Hawker’s explanation and gave him the “*benefit of the doubt.*” However, subsequently, Mr Appleton’s colleague, [S], remained concerned about the content of the email and hence Mr Blay became involved and contacted Mr Gibson. Mr Appleton does not accept that he was aware of how the deal was broken down and structured. Mr Appleton says this was not the case; rather:

The only knowledge that I had that the deal might not be as John had represented to me was the email between John and Mr [H] which John had accidentally sent through to me.

[27] The further evidence of Mr Gibson is that after meeting with Mr Hawker on 22nd March 2011, upon making further enquiries with BMW FS (Mr Appleton), he discovered that Mr Hawker had invoiced BMW FS, on behalf of TML, the sum of \$79,000 for the Range Rover being purchased by Mr H. Mr Gibson says that the invoice falsely represented that TML owned and was selling the Range Rover for that price with the effect that this would have given BMW FS “*comfort*” that the vehicle’s value was as invoiced. Mr Gibson attests that: *This was false and well outside John’s authority levels.*

(d) **Meeting on 23rd March 2011 – the termination of Mr Hawker’s employment**

[28] Mr Gibson met with Mr Hawker on this day at 10:00a.m. and informed him of his findings on the allegations pertaining to the two deals in question. Mr Gibson says that he also told Mr Hawker of the discovery pertaining to the invoice for the Range Rover; and that Mr Hawker said it was an “*administrative error*” and that he would have “*reversed it.*” Mr Gibson states that he did not accept this explanation as it did not “*make sense.*” Mr Gibson says that:

I believed that John had deliberately created the invoice outside of our normal dealer management system to give the impression that we [TML] owned the Range Rover. If he had not done this, BMW FS would have paid the money direct to the third party owner, Mr [V].

[29] The evidence of Mr Gibson is that because Mr Hawker did not offer any further explanation in relation the allegations and overall findings that had been put to him, Mr Gibson advised Mr Hawker that he had decided that there had been serious misconduct and summary dismissal was appropriate. Mr Gibson says that:

I then explained that before I confirmed my decision to dismiss I wanted to give him the opportunity to resign. I saw this as an alternative to dismissal for John. I knew the car sales industry was relatively close knit and I thought that it may assist him in finding alternative work to have a resignation on his record, rather than a dismissal.

Mr Gibson attests that Mr Hawker asked for some time to consider that offer and to speak to his partner, but would come back to Mr Gibson within the hour. It subsequently transpired that Mr Hawker did not return to the office until 4:00p.m. He gave Mr Gibson a handwritten (and signed) resignation; thus:

I JOHN HAWKER RESIGN MY POSTION AS BUSINESS MANAGER AT TEAM MCMILLAN WITH IMMEDIATE EFFECT.

[30] Via his lawyer, Mr Hawker raised a personal grievance on 12th April 2011 alleging that there had been a constructive dismissal.

Analysis and Conclusions

[31] The first issue that requires determination is:

Was Mr Hawker constructively dismissed?

Mr Hawker says that his resignation was in fact a constructive dismissal falling within the first of the three categories established by *Auckland etc Shop Employees IUOW v*

*Woolworths Ltd*² whereby an employee is given the choice between resigning or being dismissed. On the other hand, it is submitted for TML that the option for Mr Hawker to resign, rather than be dismissed, cannot be seen as repudiatory conduct by the employer. It is submitted that the decision by Mr Hawker to resign was voluntary and was motivated by him wanting to improve his prospects of securing alternative employment.

[32] But it seems to me that given the overall circumstances, it would be a mistake to attempt to place the termination of Mr Hawker's employment into a particular legal "box" as the concept of "saving face by resigning" is not new. In theory, the argument that Mr Hawker was constructively dismissed probably has more weight as the indisputable reality is, that had Mr Hawker not accepted the option advanced by Mr Gibson, then there is no doubt that a summary dismissal, on the ground of serious misconduct, would have resulted. Furthermore, Mr Hawker fully understood this and took some time to consider his options. In any event, I have no difficulty in deciding that the departure of Mr Hawker from his employment was certainly not a voluntary action on his part; hence he was dismissed

[33] The finding that Mr Hawker was dismissed moves us to the primary issue to be determined:

Was the dismissal of Mr Hawker justified?

The test the Authority must apply is provided by s.103A of the Employment Relations Act 2000 (the Act) in that the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would³ have done in all the circumstances at the time the dismissal or action occurred. Section 103A requires the Authority to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by the employer when carrying out its inquiry, and of its decision to dismiss Mr Hawker.⁴

The nature of the disciplinary investigation

[34] Mr Hawker says that the investigation undertaken by TML fell short of what a fair and reasonable employer would have done, in a number of respects.

² [1985] 2 NZLR 372

³ Given that Mr Hawker was dismissed prior to 1st April 2011, this is the test that applies, rather than the subsequent test ("could") provided by the Employment Relations Amendment Act 2010.

⁴ *Air Nelson Limited v C* [2011] NZCA 488, (unreported) 23 September 2011.

Undue haste

[35] It is submitted that the investigation was carried out with “undue haste.” Mr Hawker relates to receiving the letter containing the allegations, on 21st March 2011 and then being required to attend a meeting the next day at 8:00a.m. The evidence of Mr Gibson is that when he met with Mr Hawker on 21st March, he gave him the option of meeting again the next day (22nd March) or 23rd or 24th March, but informed that he could not meet with Mr Hawker after 10:00a.m. on 22nd March. Mr Gibson states that Mr Hawker told him that he would like to “*get on with it*” and it was agreed that they would meet the next day at 8:00a.m. The submission for Mr Hawker is that he disputes being given options for the second meeting, but there is little evidence from him about this. I also note that under cross-examination from Mr Langton, Mr Hawker acknowledged that several meeting times were discussed and that he was later told by Mr Gibson that as the commitment that he had after 10:00a.m. on 22nd March had been cancelled, the meeting could be later that day if Mr Hawker wanted that. But Mr Hawker told the Authority: “*I then said let’s get on with it.*”

[36] On the balance of the evidence, I am satisfied that Mr Hawker was given several options in regard to when the second meeting with Mr Gibson could take place. Mr Hawker also says that he did not think that he could ask for more time but I do not find that to be credible given Mr Hawker’s obvious confidence and the role that he held. Also the evidence is that Mr Hawker was able to prepare a comprehensive written response to the two allegations made against him within the time frame that he had agreed to.

[37] It is submitted that Mr Hawker was “deprived of a proper opportunity to consider matters and take advice.” But further to the above findings, there is no evidence that Mr Hawker required more time, albeit it was clearly available to him had he sought to avail himself of such.

[38] Finally, Mr Hawker says that because of his suspension, he did not have access to the necessary records required to make a thorough response to the allegations made in the letter of 21st March 2011. Conversely, TML says that Mr Hawker was provided with documentation relevant to the allegations when he was given the letter that set them out. Then there is the evidence of Mr Gibson:

John asked for some more information at the meeting [21st March]. As I had all the files with me I opened them and we went through them together, document by document. I offered John the opportunity to take photocopies if he would like. He said this was not necessary.

This evidence was not challenged by Mr Hawker nor is there any evidence from him about what further records he required. Furthermore, Mr Hawker has not indicated that he was unfairly disadvantaged in any specific way; rather the submissions for him are couched in such broad terms that it is impossible to conclude that any unfairness was visited upon Mr Hawker in regard to his adequate preparation for the meeting on 22nd March 2011.

[39] In summary, I do not accept that the meetings with Mr Hawker were conducted with undue haste.

The obligation to provide information relating to the potential dismissal

[40] It is submitted for Mr Hawker that TML failed to discharge its duty of good faith pursuant to s.4)(1A(c) of the Act. This provision of the Act provides that:

The duty of good faith in subsection (1) –

- (a)
- (b)
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of 1 or more of his or her employees to provide to the employees affected-
 - (i) access to information, relevant to the continuation of the employee's employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

[41] It is submitted that Mr Hawker was entitled to be given a variety of information and that there was a failure to allow him to comment on certain matters. For example, reference is made to notes "taken by Mr Gibson during his discussions with Mr Penfold, Mr McMillan and Ms Jones." But there is no evidence that such notes exist and this was never raised by Mr Hawker at any of the meetings with Mr Gibson, or in his evidence to the Authority. Neither was the existence (or otherwise) of such notes ever brought to the attention of the Authority; before or during the investigation meeting. And more to the point, the matter of whether any notes were taken or exist, was never put to Mr Gibson by Mr Erickson during cross-examination. Finally, and of particular relevance, even if such notes do exist (albeit there is no evidence of such), Mr Hawker has not provided any relevant evidence about them or

what effect their purported absence may have had in regard to the circumstances he found himself in. Hence, the Authority is left to ponder why this matter has been raised at all.

[42] Mention is also made of the fact that a statement was given to Mr Gibson by Ms Jones and that this was withheld, at her request, for reasons of confidentiality. The Authority has not sighted this statement but I can find nothing in the overall evidence to suggest that anything that Ms Jones may have had to say would have carried much or indeed any weight, in regard to the conclusions that Mr Gibson reached regarding the actions of Mr Hawker. Ms Jones gave evidence to the Authority and she was cross-examined by Mr Erickson but nothing was put to her about the information she provided to Mr Gibson. Neither did Mr Gibson ever appear to suggest to Mr Hawker that he was relying on anything that Ms Jones may have provided in regard to the progress or outcome of the disciplinary process. In the round, there is nothing to suggest that any unfairness was visited upon Mr Hawker by the failure to produce the written statement of Ms Jones or for that matter, anything else that Ms Jones may have contributed during the investigation into the conduct of Mr Hawker.

[43] A further submission for Mr Hawker is that he was entitled be advised of, and given an opportunity to respond to, Mr Gibson's "adverse perception of his credibility." It is also argued that Mr Gibson's preference for the version of events given by Mr Penfold, should have been put to Mr Hawker for his response, prior to the decision being made to dismiss him. Conversely, it has been submitted for TML that having received notice of the allegations and the relevant information, Mr Hawker was then given a real opportunity to respond. Mr Hawker provided a written and oral response on 22nd March 2011. The further submission for TML is that Mr Gibson considered Mr Hawker's responses - then checked certain aspects of them with Mr Penfold, Mr McMillan and Mr Appleton - and subsequently informed Mr Hawker of the outcome of the further enquiries. An analysis of the weight of the evidence confirms that this is so and I am left to conclude that the general process followed by Mr Gibson was fair and reasonable and that it complied with the generally accepted legal principles established by such cases as *NZ (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd.*⁵

⁵ (1990) ERNZ Sel Cas 582

The Range Rover invoice

[44] There is one other matter that has been raised by Mr Hawker in regard to the disciplinary process. This relates to the invoice created by him pertaining to the Range Rover involved in the Mr H deal. It is submitted for Mr Hawker that he was not given a proper opportunity to respond to this issue when it was put to him on 23rd March 2011, shortly before being informed by Mr Gibson that dismissal was considered to be the appropriate sanction. It is submitted for Mr Hawker that the matter of the existence of the invoice and the reason for its creation by Mr Hawker had “a significant bearing” on the decision to dismiss. And given that Mr Hawker’s explanation for the invoice was that it was an “administration error” and that he could have remedied it, then this matter should have been investigated further by Mr Gibson.

[45] Perhaps this is so, to a point, but taking the overall weight of the evidence into account, it seems to me that the matter of the invoice for the Range Rover, while considered to be culpable behaviour on the part of Mr Hawker, was not a factor that appears to have weighed on Mr Gibson’s mind to the extent that Mr Erickson attributes to it. Rather, it is my conclusion that the actions of Mr Hawker in regard to the Mr O deal and the Mr H deal, as put to him at the beginning of the disciplinary process, and Mr Gibson’s subsequent overall findings about these, more probably than not, dominated Mr Gibson’s thought processes in arriving at his decision to dismiss Mr Hawker. But in any event, on the weight of the evidence, it is difficult to see how any further investigation of Mr Hawker’s explanation about the creation of the invoice would have made any difference to the outcome.

Was TML entitled to treat the actions of Mr Hawker as serious misconduct?

[46] TML says that there was justification for treating the actions of Mr Hawker as serious misconduct because (among other things):

- (a) The financial information that was forwarded to BMW FS on the applications for finance for Mr O and Mr H, were misrepresentations of the true financial situation for both of these customers. Mr Hawker did not have authority to structure the applications in the manner that they went forward to BMW FS, yet he went ahead and did so without the approval of Mr Gibson.⁶

⁶ The evidence of Mr Gibson is that he would not have approved either of the applications in that form.

- (b) The role of Business Manager is an important one within TMS and an “enormous amount” of trust, along with correspondingly high expectations, was associated with the duties of Mr Hawker, hence he was responsible and accountable for his actions in regard to the finance applications that went forward to BMW FS. Also, finance companies rely on the sale price and deposit figures provided by the dealership as being correct and the amount of the cash deposit or trade-in value, relative to the sale price of a vehicle, is one of the key factors that the finance companies rely on when assessing a customer’s risk profile; and therefore whether or not to approve finance.
- (c) The integrity and reputation of TML and its associated ability to obtain finance for its customers, depends upon the Business Manager gaining the trust of the finance company via an accurate representation of the customer’s “deal” and financial position.

[47] Given the importance of the role held by Mr Hawker and the trust that was vested in him by TML, along with the associated value and importance of the business relationship between TML and BMW FS, I accept that TML was entitled to treat the actions of Mr Hawker regarding the substantial misrepresentations contained in the applications for finance regarding Mr O and Mr H, as serious misconduct warranting a disciplinary sanction.

Was the dismissal of Mr Hawker what a fair and reasonable employer would have done in all the circumstances?

[48] The submissions for Mr Hawker are that there are several reasons why TML should not have concluded that his actions constituted serious misconduct, justifying his dismissal. Firstly, it is argued that the two deals at issue were “necessarily complex” in order to allow them to “occur” for the benefit of the customer and TML. It is submitted that neither deal caused loss to any party nor did they create any gain above and beyond that to which Mr Hawker was entitled to under his commission agreement. And the financial benefit to Mr Hawker was, in fact, very limited in both instances. It is also argued that Mr Hawker was “under considerable pressure from management” and other staff at TML to find a way for deals to proceed. Therefore, Mr Hawker used “creative means” to achieve completion of the two deals at issue which he believed were in keeping with “the industry norm.”

[49] Secondly, it is submitted that “misrepresentations of this nature” were not unknown to Mr Gibson and that on previous occasions he had consented to similar deals both verbally and in writing. In support of these two arguments the attention of the Authority is drawn to an application for finance that was made in September 2010, involving an organisation located at Botany Downs.⁷ It is submitted that the particulars of the Botany Downs deal and the “misrepresentation” to BMW FS bear a close resemblance to the deal with Mr O, and that Mr Gibson approved the Botany Downs deal, as evidenced by an exchange of emails dated 22nd September 2010. But the evidence of Mr Gibson is that he verbally “*forbade*” Mr Hawker (and Ms Jones) from proceeding with this transaction and Mr Gibson says that the only part of the original transaction that he approved, as evidenced by his “Ok” in the email, was the “*recourse*”⁸ sum of \$4,600 (not \$5,600) for the duration of the finance contract (48 months). While Mr Hawker disputes this, I prefer the evidence of Mr Gibson. Further, a fundamental difference is that Mr Hawker knew that the Botany Downs deal required the approval of Mr Gibson, as it was somewhat of a departure from normal practice. But Mr Hawker never sought the approval of Mr Gibson for the Mr O and Mr H deals, most probably because he knew that it would not be forthcoming. I also find that while it appears to be accepted in the industry that concluding creative deals is part of the cut and thrust of doing business, and there is some scope for a certain amount of ingenuity, I conclude that the actions of Mr Hawker in relation to the two deals in issue were considerably outside the accepted parameters of what was acceptable to TML, and also possibly the legal framework that the industry is required to comply with.

[50] Thirdly, it is argued for Mr Hawker that all members of the TML team, including Mr Gibson, Mr Penfold and Mr McMillan benefitted from the Mr O and Mr H deals in that both deals contributed to the monthly sales total. That could possibly be true as TML honoured the deals in order to satisfy the two customers, but that does not suggest for a moment that the deals were condoned. On the contrary, clearly they were not.

⁷ In order to protect the identity of the customer in this transaction I will refer to “the Botany Downs deal.”

⁸ Mr Gibson explained to the Authority that the term “recourse” refers to a sum of money that the finance company may have recourse to from the dealership, who effectively acts as the guarantor for the agreed sum.

[51] Finally, it is argued that Mr Gibson placed “significant weight” on the deterioration of the relationship between TML and BMW FS when deciding to dismiss Mr Hawker. It is submitted that there were other important elements that a fair and reasonable employer would have found to have materially affected the relationship between the two organisations. In particular, it is argued, that Mr Gibson had engaged in a “confrontational” email exchange with BMW FS shortly before (8th March 2011) the dismissal of Mr Hawker. But I find that while Mr Gibson certainly robustly supported Mr Hawker on that occasion and that some tension between the people involved, more probably than not, resulted, what appears to be overlooked by Mr Hawker, is that it is the damage to the trust and confidence relationship between TML and BMW FS that was paramount in Mr Gibson’s mind in coming to the decision to dismiss. This is particularly so given that there had been ongoing problems associated with Mr Hawker’s relationship with BMW FS and that Mr Hawker had been taken to task over this as recently as December 2010. Furthermore, he was on notice (which he has acknowledged) that his relationship with BMW FS remained under review and any further “unacceptable conduct” would see the “disciplinary matters” revisited and Mr Hawker’s employment may be in jeopardy.⁹

Determination

[52] In determining the question of whether the dismissal of Mr Hawker is justifiable, the Authority is cognisant of the established (and often quoted) finding by the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd*.¹⁰

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court’s judgment in *BP Oil NZ Ltd v Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. **Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship.** In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one that a reasonable and fair employer would have taken in the circumstances. (My emphasis)

[53] In summary, having weighed the overall evidence and the respective arguments of both parties, I find that a fair and reasonable employer faced with the circumstances surrounding the actions of Mr Hawker, as they pertained to the two

⁹ See the letter dated 2nd December 2010 from Mr Gibson to Mr Hawker.

¹⁰ [1992] 3 ERNZ 483,487

deals in question, would have dismissed him on the grounds that his conduct deeply impaired or was destructive of the basic trust and confidence that is an essential of the employment relationship. It follows that I find that the dismissal of Mr Hawker was justifiable substantively and procedurally.

The claim of unjustified disadvantage

[54] This claim relates to the suspension of Mr Hawker from his employment on 21st March 2011. The test in regard to whether an employee has had his employment affected to his disadvantage by some unjustifiable action by his employer pursuant to s103(1)(b) of the Act is also to be found at s.103A of the Act. That is, the Authority must determine on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the action [the suspension] occurred.

[55] There is a paucity of evidence from Mr Hawker in relation to his claim that he was disadvantaged in his employment by an unjustified action by TML. The submissions for Mr Hawker about this matter are also scant. On the evidence available, there is little to suggest that there was anything unfair or unreasonable about the suspension of Mr Hawker from his employment and there is slight evidence from Mr Hawker to seriously suggest that he was unjustifiably disadvantaged by this action. Viewed objectively, given the seriousness of the allegations put to Mr Hawker at the time, and the tenuous nature of the relationship between TML and BMW FS, I conclude that a fair and reasonable employer would have suspended Mr Hawker from his employment whilst the matters at issue were investigated further. The suspension was also consistent with clause 6.6 of the employment agreement that allows for such. It follows that I find that Mr Hawker does not have a personal grievance that can be upheld.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority and that the investigation meeting was completed within one day.

In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority