

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 178
3014991

BETWEEN NICK KRAAN
 Applicant

AND TOTAL ACCESS LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Alison Maelzer, Counsel for the Applicant
 Richard Upton, Counsel for the Respondent

Investigation Meeting: 26 March 2018 and 28 March 2018

Determination: 5 June 2018

DETERMINATION OF THE AUTHORITY

- A. Total Access Limited did not act unjustifiably in the events that led Nick Kraan to give notice of resignation from his employment by TAL. The end of his employment was not a constructive dismissal.**
- B. Following Mr Kraan giving notice of resignation TAL did unjustifiably disadvantage him by:**
- (i) suspending him on 26 April 2017;**
 - (ii) unreasonable instructions about access to his personal computer; and**
 - (iii) withholding salary payments due to him.**
- C. In settlement of Mr Kraan's personal grievance for unjustified disadvantage, and within 28 days of the date of this determination, TAL must pay Mr Kraan the sum of \$9,000 as compensation for humiliation, loss of dignity and injury to his feelings.**

- D. TAL failed to establish Mr Kraan had breached restraint of trade obligations to TAL and, consequently, failed to establish he should refund a payment made to him for that restraint period.**
- E. Within 28 days of the date of this determination TAL must pay Mr Kraan the following sums as wage arrears:**
- (i) \$9,140.17 as the remainder due to him in payment of one month's normal salary under a term of his employment agreement when TAL invoked a restraint of trade clause;**
 - (ii) \$38,666.66 as payments due for the performance component of his annual salary for the period from 1 April to 4 August 2017;**
 - (iii) \$1,159.99 as a KiwiSaver contribution and \$3,093.33 as holiday pay due on the amount due under (ii); and**
 - (iv) Interest on the amounts at (i), (ii) and (iii) at the annual rate of 5 per cent calculated from 5 August 2017 to the date of payment.**
- F. Within 28 days of the date of this determination TAL must also pay to the Authority, for transfer to the Crown Account, a penalty of \$5000 for breaches of Mr Kraan's employment agreement.**
- G. Costs are reserved with a timetable for memoranda set if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] On 4 March 2017 Nick Kraan gave notice of resignation from his position as general manager of Total Access Limited's construction hire equipment business. His letter of resignation proposed he finish work on 4 August 2017 "to enable a smooth transition" for himself and the company. Mr Kraan's letter described his role as having been dis-established as a result of a decision by TAL's directors Shannon Chambers and Vicki Chambers to appoint an additional senior manager in the business. His letter said the job description for Mike Vitali, who was appointed to a

newly created role with the job title of national operations manager, ‘mirrored’ Mr Kraan’s role as general manager.

[2] On 20 April Mr Kraan’s lawyer wrote to TAL describing his resignation as a constructive dismissal resulting from unilateral changes to his role. The letter proposed Mr Kraan be placed on three months paid ‘gardening leave’, during which he would assist with handover tasks, and be paid \$10,000 compensation. No formal reply to that proposal was made before, in the following week, Mrs Chambers sent Mr Kraan an email questioning the adequacy of hours he had spent at the office since sending his resignation letter. After Mr Kraan responded, setting out the work he was doing and explaining he had visited the doctor that day due to the symptoms of a throat virus, Mrs Chambers sent him an email advising he was not required to attend the office or undertake his duties as a general manager “until this is resolved”. Mr Kraan’s electronic remote access to the company’s IT systems was removed and calls to the number for his work-supplied mobile telephone were diverted to Mr Chambers.

[3] By email on 1 May TAL’s lawyer advised Mr Kraan’s lawyer that the company wanted Mr Kraan to provide the personal computer he used for his TAL work to a computer forensics expert so that all work related matter on it could be permanently removed. The email advised that TAL would “discuss whether an amicable resolution could be achieved” once this had occurred.

[4] Mr Kraan’s lawyer replied raising disadvantage grievances for unjustified suspension and for unjustified variations to his role. His lawyer’s letter, dated 4 May 2017, also gave notice that Mr Kraan would have a personal grievance for constructive dismissal once his notice expired on 4 August. The letter also asked if TAL wished to invoke a restraint of trade term in Mr Kraan’s employment agreement.

[5] In the following weeks correspondence between the parties’ lawyers continued over various issues. Those issues included:

- (a) a failure to Mr Kraan on his usual pay day on one occasion;
- (b) delays in payment of a quarterly performance component of his salary;
- (c) whether a deed of undertaking he provided about removal of TAL work files from his computer was sufficient; and

- (d) whether TAL's request for him to provide his computer to its appointed expert was a reasonable request that could result in disciplinary action if he failed to comply with it.

[6] Shortly after Mr Kraan's notice period expired, and his employment had ended, TAL confirmed it did want to invoke the restraint term in its employment agreement with him. It then paid Mr Kraan the value of one month's base salary. TAL considered this met the requirements of its restraint term to pay one month's "normal salary" if it opted to invoke the clause. Mr Kraan considered the payment inadequate. He said his "normal" salary included quarterly KPI payments due under a non-discretionary formula set out in his employment agreement with TAL.

[7] Mr Kraan first lodged a statement of problem on 10 July 2017. This was amended on 17 October 2017 to include events up to the end of his employment and, in respect of payments made or not made to him, afterwards. TAL's statement in reply denied his claims that it had acted unjustifiably in changing Mr Kraan's role in the business or by any of its actions during his notice period. It said TAL had provided all payments due to Mr Kraan. TAL's reply also raised a counterclaim seeking repayment of the amount paid to invoke the restraint term. It said Mr Kraan had not adhered to the restraint and secured employment with a competitor of TAL during its term.

The issues

[8] By the conclusion of the Authority investigation, the following issues remained for determination:

- (i) Was Mr Kraan unjustifiably disadvantaged by a unilateral amendment of his role and if so, was that such a serious breach of the terms of his employment that his resignation should be deemed to have really been a constructive dismissal?
- (ii) Whatever conclusion is reached on issue (i), was Mr Kraan unjustifiably disadvantaged by one or more of the following actions of TAL between 5 March and 4 August 2017:
 - (a) Suspending him from his duties on 26 April 2017; and/or
 - (b) Instructing him to provide his personal computer to a third party company, and advising he would be subject to disciplinary action if he did not comply; and/or

- (c) Not paying him the performance element of his salary?
- (iii) If TAL acted unjustifiably (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (a) Lost wages and lost benefits (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) If any remedies were awarded, should they be reduced (under s124 of the Act) for any blameworthy actions of Mr Kraan that contributed towards the situation that gave rise to his grievance?
- (v) Is Mr Kraan entitled to an order for payment of arrears of wages, with interest?
- (vi) Is TAL entitled to an order for repayment of an amount paid to Mr Kraan as consideration for a restraint of trade term in his employment agreement?
- (vii) Is TAL liable for any penalties under s 134 of the Act (for non-payment of wages and holiday pay), and, if so, of what amount and should Mr Kraan be awarded some or all of such an amount?
- (viii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[9] Mr Kraan, Mr Chambers, Mrs Chambers, Mr Vitali and Mr Kraan's stepdaughter Julie Walter each gave written and oral evidence in the Authority's investigation. Those witnesses answered questions from me and then from the parties' representatives at an investigation meeting on 26 March. The meeting was then adjourned until 28 March when, by telephone conference, the representatives provided oral closing arguments on written submissions they each lodged.

[10] During questioning on 26 March some answers from Mr Chambers, Mrs Chambers and Mr Kraan referred to emails and text messages they were said to have exchanged. However some of that supposed electronic correspondence was not included in an agreed bundle of documents the parties had lodged under timetable directions set for the investigation. It was highly unsatisfactory that evidence of this supposed communication – held by both parties on their own computers and mobile

phones – was not provided but witnesses sought to refer to it as supporting their account of events. The parties were invited to consider whether the investigation should be adjourned and reconvened at a date some weeks later once they completed the task of assembling and providing any such material. After consulting with their representatives the parties opted to continue with the investigation on 26 March. They did so on the basis that Mrs Chambers was permitted to produce a copy of emails exchanged between her and Mr Kraan on 3 April and a reference to “various texts and emails” in Mr Kraan’s written witness statement was deleted.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Constructive dismissal

[12] Mr Kraan’s claim of unjustified dismissal rests on the legal concept of constructive dismissal. This includes situations where an employer had breached its duties to an employee and that breach has caused the employee to resign. If such a breach of duty was serious enough to make it reasonably foreseeable that the employee would resign rather than put up with that situation, the end of the employment may be determined to have been a constructive dismissal.¹ This means the resignation is seen as the result of the employer’s actions rather than occurring at the volition of the employee. Those actions of the employer are then judged on the standard of justifiability, that is whether or not its actions were what a fair and reasonable employer could have done in all the circumstances at the time.² If not, the dismissal will be determined to be unjustified.

[13] Whether a resignation was, in substance, a constructive dismissal requires an assessment of the facts and circumstances that led to it.³ In Mr Kraan’s case the relevant breach was said to be changes in his duties and work that resulted from the appointment of Mr Vitali to the newly created operations manager role. Mr Kraan said he was unjustifiably disadvantaged by how those changes came about and their effect on his work in the role of general manager. If such a breach of his terms of

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172.

² Employment Relations Act 2000, s 103A.

³ *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* (1985) ERNZ Sel Cas 136, 140-141.

employment were held to be an unjustified disadvantage, Mr Kraan's argument was that his notice of resignation, given seven days after Mr Vitali started work, was brought about by a sufficiently serious unjustified action of his employer so that the end of his employment should be deemed a constructive dismissal.

Changes to Mr Kraan's role: an unjustified disadvantage?

[14] Mr Kraan had a work background as a business consultant. This led to occasional contact with Mr Chambers and his earlier business activities between 2004 and 2013. In late 2013 they discussed the notion of Mr Kraan working as TAL's general manager. In further discussion in early 2014 they agreed on remuneration for the role, comprising a base salary with a KPI performance component. Mr Chambers provided a draft employment agreement and Mr Kraan prepared a formula for calculation of performance payments. This formula was included in the terms of the employment agreement under which Mr Kraan began working for TAL in February 2014. The agreement identified his position as "general manager" and included a five-page position description.

[15] Over the following three years TAL's business grew considerably. Its annual revenue more than trebled. Through this period Mr Kraan was primarily responsible for the company's operations although Mr Chambers and Mrs Chambers also played what he called "an active role on a day-to-day basis". Mr Kraan's position description described the overall purpose of his role as being to provide leadership and manage operations "within the Auckland region" and to "lead and direct" TAL's offices within both the Auckland and Waikato regions. It included "driving the overall strategic plans" and ensuring compliance with health and safety policies. Other "key tasks" were summarised under headings of Business Development, Planning, Reporting and Financial Management. In practice the role extended to involvement with branches in Wellington and the Bay of Plenty. It included dealing with staff issues, training and health and safety matters.

[16] In early February 2017 Mr Chambers arranged a meeting with Mr Kraan to discuss the structure of the business. Mr Chambers told Mr Kraan that he and Mrs Chambers felt 'burnt out' and wanted to reduce the amount of time they spent working in the business. Mr Chambers said he was looking at employing another senior manager to take over some of the duties he looked after. He said this would

include the day to day running of the business and particularly managing regional managers and staff. Mr Chambers said he already had a candidate in mind for the role, Mr Vitali. He talked about Mr Vitali's ability to form positive relationships with staff.

[17] Mr Chambers said he thought Mr Kraan's role would become more focussed on finance matters. This would involve him moving "upstairs" into the corporate offices at TAL's Auckland premises. Mr Kraan said he did not want to lose people management aspects of his current role, particularly of the Auckland scaffolding team.

[18] Mr Chambers responded by asking Mr Kraan to prepare a list of his tasks and what Mr Kraan wanted Mr Vitali to do. He also asked Mr Kraan to prepare a job description for the new role.

[19] By 22 February Mr Kraan had not prepared either document asked for by Mr Chambers. He had sought to talk to Mr Chambers about his own role during the intervening period but, according to Mr Kraan's evidence for the Authority investigation, he felt Mr Chambers was "evasive". Mr Chambers had however, apparently in response to a query from Mr Kraan, sent him the following text on 22 February: "Your role would have to be CEO/CFO and Mike Vitali would be more of a CCO".

[20] Meanwhile Mr Chambers had arranged for Mr Vitali to start work for TAL on Monday 27 February. On the Friday beforehand, 24 February, Mr Chambers asked Mr Kraan about progress in preparing a job description as he wanted to include it with an employment agreement being prepared for Mr Vitali. Mr Kraan said he would look at it over the weekend but provided nothing to Mr Chambers. Mr Kraan did not attend work on 27 February as he was sick.

[21] When Mr Kraan arrived at work on Tuesday, 28 February Mr Chambers asked him to meet in his office upstairs. Mrs Chambers was also present. Mr Chambers referred to Mr Vitali starting work the previous day. He handed Mr Kraan a copy of a job description Mrs Chambers had prepared for Mr Vitali headed "National Operations Manager". Mr Chambers then invited Mr Vitali to join the meeting. There was a brief discussion of roles although Mr Kraan did not recall much of it.

[22] In his evidence for the Authority investigation Mr Kraan said his immediate concern was Mr Vitali's job description appeared to cover areas within his role as General Manager. This included a reference to overseeing, leading and developing all TAL branches "with management responsibility across the functional areas of operations, maintenance, risk management and employee development". It also referred to responsibility "for executing the strategy to grow revenue, transactions and profit".

[23] A further concern was that the job was described as "reporting directly to the Director and working alongside the General Manager".

[24] For the remainder of the week Mr Chambers and Mr Vitali worked together making various changes in the business. This included reorganising the scaffold yard. Mr Kraan said he thought the yard changes were less efficient and safe but was "overruled" by Mr Chambers. During that week Mr Vitali had also endeavoured to talk with Mr Kraan about how he felt over changes in the business but was rebuffed by Mr Kraan.

[25] Mrs Chambers' evidence was that, around this time, she had asked Mr Kraan why he was not assisting with some information Mr Vitali had asked for. She said Mr Kraan had responded: "I don't want anything to do with him, he is your and Shannon [Chambers'] project". Mr Kraan denies he said that to Mrs Chambers. He accepted he had referred to Mr Vitali as a "side project" of Mr and Mrs Chambers but said he had made that comment directly to Mr Vitali some weeks after giving his notice of resignation.

[26] According to Mr Kraan's evidence he was "gutted" by changes made after Mr Vitali joined the business, particularly that Mr Vitali took over direct staff management. This included signing leave requests, a task Mr Kraan had previously done.

[27] Over the weekend of 3 and 4 March Mr Kraan wrote a letter of resignation. His letter criticised changes resulting from Mr Vitali's appointment and complained Mr Kraan had not met with Mr Vitali, who he referred to as "Shannon's proposed candidate", before he started work. Mr Kraan wrote that his role had been

disestablished. He described this as a breach of good faith and appearing to be part of “well planned and pre-set” decisions made by the directors. He proposed ending his employment in five months, on 4 August. He set out five areas in which he intended completing specific tasks before then.

[28] On the morning of 5 March Mr Chambers asked to meet with Mr Kraan. Before that letter could take place Mr Kraan provided Mr Chambers with his prepared resignation letter. Both Mr and Mrs Chambers talked with Mr Kraan separately that day, disagreeing that his role was disestablished or that they wanted him to leave. Neither changed his mind about his notice of resignation.

[29] A unilateral variation to terms and conditions of employment, including an employee’s role, may give rise to an unjustified disadvantage. Mr Kraan submitted his role was unilaterally changed in February 2017 by transferring tasks and responsibilities to Mr Vitali. The relevant period of assessment of those asserted changes in from 27 February to 5 March. After that latter date whatever changes occurred were affected by the fact of Mr Kraan’s notice of resignation and the tasks he was focussing on completing before his departure date.

[30] Mr Kraan submitted the employment of Mr Vitali and the tasks Mr Chambers assigned to Mr Vitali, removing those tasks from him, breached a term of his employment agreement that said no variation to that agreement would be effective unless mutually agreed in writing and signed by both parties. His position description was incorporated into that agreement by another term in the agreement referring to his duties and responsibilities.

[31] Several factors qualified the effect of those terms in ways that did not support Mr Kraan’s submission. Firstly, the term stated his position description could “be amended from time to time due to business requirements.”

[32] Secondly, TAL’s directors were entitled to consider changes to the business and management structure. It was not unreasonable for TAL to reconsider its management structure after three years of significant growth. However TAL was required to act in good faith when considering changes to that structure, including by consulting affected employees about the effects on them of any proposed changes.

[33] In this case Mr Chambers had endeavoured to consult Mr Kraan about the proposal to add a new management position. He had not misled Mr Kraan or deceived him about the nature of the proposal, for a new operational role or his view about a suitable appointment to it. That consultation included asking Mr Kraan to contribute to the shape or scope of the change by analysing his own work, setting limits on what tasks he wished to continue doing and what could be assigned to a new manager, and proposing a job description for that new role. It was an opportunity for Mr Kraan to propose the reporting line and the extent of responsibilities of a new manager. In responding to that request Mr Kraan was subject to his own good faith obligations to be active, constructive and responsive. It was a request comfortably within the scope of what a director could ask of a company general manager. Mr Kraan also complained that Mr Chambers had not arranged for him to meet Mr Vitali before his appointment was confirmed but Mr Kraan accepted he did nothing himself to arrange such a meeting.

[34] Mr Kraan submitted there were “striking similarities” between his position description and the one given to Mr Vitali but this resulted, in part, from his own inactivity and unresponsiveness to Mr Chambers’ request. When Mr Vitali began work on 27 February, Mr Chambers had no position description to show him. He found that to be an embarrassing situation and Mrs Chambers quickly put together a document drawing on existing job descriptions in the business, including that of Mr Kraan, and on text she copied from results of an online Google search. The resulting document was, bluntly, a mishmash of quite vague business jargon about monitoring, managing and executing various activities. What it meant in terms of who would carry out actual tasks, and how respective levels of responsibility and authority would compare with the general manager’s role, clearly would have required further discussion. Mr Kraan resigned before making reasonable efforts to have those discussions.

[35] On balance, as submitted by TAL, the evidence established Mr Kraan had not engaged productively with Mr Chambers’ request or been sufficiently active up to 27 February to communicate and explain concerns or objections he had to the proposed change.

[36] A similar conclusion applied to the period of seven days from Mr Vitali starting work on 27 February to Mr Kraan giving his notice of resignation on 5 March. In that period Mr Kraan was concerned that Mr Vitali had worked with Mr Chambers on re-organising the scaffold yard and dealt directly with staff, including signing leave forms and dealing with some disciplinary matters. He said he had tried to talk to Mr Chambers about Mr Vitali's role encroaching on his but Mr Chambers had refused to discuss it. Apart from his assertion on this point, there was no evidence Mr Kraan had actively sought to discuss the respective roles and the lines of responsibility or authority with Mr Chambers. Mr Chambers did however initiate a meeting on the morning of 5 March, where Mr Kraan could have taken the opportunity have such a discussion about those concerns. Whatever difference using that opportunity might have made was lost by his decision to hand in his resignation. He also made it clear to Mr Chambers and Mrs Chambers in separate conversations that day that he did not want to discuss it with them any further.

[37] Accordingly, even if Mr Kraan considered he was disadvantaged by the change, the evidence did not support a finding that TAL's actions fell outside the range of what a fair and reasonable employer could have done at the time. Put another way, its proposal and attempts to seek Mr Kraan's input into the role of a new manager was not a breach of his terms of employment or a failure of its good faith obligations.

[38] A consequence of that conclusion was that the notice of resignation he gave on 5 March was not caused by a sufficiently serious breach such that, objectively, an employer could reasonably foresee an employee in that situation would resign.⁴ Mr Kraan's decision to resign was therefore not a constructive dismissal.

Other unjustified disadvantages

[39] Mr Kraan, as proposed in his 5 March notice of resignation, intended to remain TAL's employee until 4 August 2017. TAL had not declined or otherwise sought to alter that proposal for a five month long notice period. It was obliged to treat him fairly and reasonably during that time. In three ways, Mr Kraan submitted, it failed to do so.

⁴ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 at [69]

(i) Suspension from duties on 26 April

[40] At 3.16pm on 26 April 2017 Mrs Chambers sent Mr Kraan a brief email which ended with the following statement: “We do not require you to attend the office or undertake your duties as a General Manager until this is resolved”. Around the same time Mr Kraan’s access to his company email account was disabled, his mobile phone number was diverted to Mr Chambers’ phone and his phone’s connection to the company’s server was also disconnected.

[41] Earlier that day Mr Kraan had sent an email to a member of TAL’s accounting staff advising that he was “available on email and txt” but his throat was too sore to speak. His email asked that staff member to “let the appropriate people know”. Attached to the email was a copy of a medical certificate, dated 26 April stating he should be fit to resume work on 29 April.

[42] Within the following hour Mrs Chambers sent him this email message:

Following receipt of your resignation letter, it has come to my attention that you have not been turning up to work during your contracted normal working hours and on some days not at all. Can you please clarify why, as you are aware that all non-attendance for any reason needs to be communicated to either Shannon or myself and as of today I have not received any.

[43] Mr Kraan responded with a 13-paragraph email setting out work he had carried out in recent days. This included attending the TAL offices each day, picking up a new employee from the airport over the Easter weekend and copying email about various business matters to Mr Chambers. He offered to talk with Mrs Chambers and Mr Chambers “in an appropriate forum”. Mrs Chambers responded with her 3.16pm email saying he was not required to attend to his duties or come to the office.

[44] This email exchange occurred six days after Mr Kraan’s lawyer had written to TAL, asserting that changes to his role were an unjustified disadvantage and his resignation amounted “at law, to a constructive dismissal”. The letter included a proposal that from 1 May he be placed on garden leave until his employment ended on 4 August. It proposed he be paid his normal salary, including performance incentives, and work from home while assisting with handover tasks and discussions “but attending occasional meetings as required”.

[45] TAL submitted Mrs Chambers' 26 April direction to Mr Kraan, not to attend the office or undertaken his duties, was placing him on garden leave. It submitted this was consistent with clause 23.1.3 of his employment agreement. The clause allowed the company, at its discretion, to require an employee who had given notice "to not attend nor report to work".

[46] Mr Kraan submitted its actions that day were really an unjustified suspension. His employment agreement included a term, at clause 26.1.1, allowing suspension on pay but only where TAL was conducting an investigation into any alleged misconduct. It also said, at clause 26.1.4, that the company would only exercise that right of suspension after informing the employee of the matters of concern and giving the employee an opportunity to respond to the issue of suspension and any terms attached to it.

[47] The evidence of Mr Chambers and Mrs Chambers revealed they did have concerns about Mr Kraan's conduct at the time. However they had not disclosed those concerns to him or given him the opportunity to respond to them before taking the action they said was placing him on garden leave and he said was a suspension.

[48] Those concerns were what they said were reported comments from "a number of sources" that Mr Kraan had said he was going to "get them", referring to Mr Chambers and Mrs Chambers. They also claimed Mr Kraan would not answer calls from Mr Chambers. They considered they needed to act with urgency because Mr Kraan had full remote electronic access to TAL's computer system.

[49] Against that background TAL's actions on 26 April clearly amounted to a suspension of Mr Kraan from carrying out his duties. It was not garden leave because the activity of cutting his email address, mobile phone connection and bank account access were more substantive and permanent actions.

[50] The suspension was also unjustified. Mrs Chambers' evidence revealed her action on 26 April was in part motivated by having seen an email from Mr Kraan to his lawyer saying "things were heating up in the office". She decided he was "a security risk" and she "had to put the brakes on". A fair and reasonable employer could not have acted in that way without first giving Mr Kraan a reasonable

opportunity to comment on his reported “get them” remark and without having responded to his lawyer’s formal proposal for garden leave. That failure was more than a minor defect in the process required by the relevant terms of his employment agreement and meant Mr Kraan was treated unfairly. It was an unjustified disadvantage.

(ii) Instructions to hand in computer for inspection

[51] This heightened state of affairs then escalated into a tussle over access to the contents of a personal laptop he used for carrying out his TAL work. It began with an email from TAL’s lawyer on 1 May that also appeared to be TAL’s first formal response to the written proposal for resolution sent by Mr Kraan’s lawyer on 20 April. Mr Kraan was told that once he had handed over his computer for analysis by a computer forensic expert, TAL would discuss “whether an amicable resolution can be achieved”. Later correspondence from TAL’s lawyer added pressure over this issue by referring to “enforcement of Mr Kraan’s restraint of trade” and threatening him with disciplinary action for not complying with the company’s instructions about handing over his laptop.

[52] The evidence of the witnesses and the contents of the extensive exchange of lawyers’ correspondence on this issue through the month of May showed Mr Kraan had made reasonable efforts to resolve TAL’s concerns. By contrast TAL acted unreasonably in not accepting a deed of undertaking Mr Kraan gave on 29 May about TAL information on his laptop computer. He provided a USB stick with a copy of that information and gave an undertaking he had deleted TAL material from his laptop, except for information required to calculate KPI payments due to him. He had also offered to meet with TAL’s preferred computer expert to show him the files and enable him to verify the deletions had been made.

[53] Mrs Chambers’ evidence also established that TAL’s declared position misleadingly said that only its expert would see the contents of Mr Kraan’s laptop. She accepted that she, or another TAL representative, would need to see all the documents to check they did not contain TAL information. She was also unable to discount Mr Kraan’s explanation that TAL information on his laptop was already copied onto an external hard drive stored at the office.

[54] TAL's treatment of Mr Kraan over this issue amount to an unjustified disadvantage. Its allegations and demands were more than minor defects in its process and resulted in him being treated unfairly.

(iii) Not paying the performance element of salary

[55] Mr Kraan correctly submitted he was unjustifiably disadvantaged by TAL's failure to pay him the performance component of his salary due for the periods from 1 April to 30 June quarter and the part-quarter from 1 July to 4 August.

[56] Payment of that performance component for a previous quarter, from 1 January to 31 March 2017, was not paid until 9 August, after his employment had ended. Mr Kraan's evidence was that such payments were usually made around a week after the end of the relevant quarter.

[57] During his notice period, and before his employment ended, Mr Kraan had reminded TAL that payment for 1 April to 30 June period was due.

[58] In her witness statement Mrs Chambers said Mr Kraan was not entitled to the "bonus" because he had "not been performing duties or contributing to the success of the business during that period of time". She described him as having "elected to remain away from the workplace" and said it would be unfair for him to get the performance payment for that period. Mr Chambers' witness statement was to the same effect but said that, "if something were due" he expected it would be a lot less than previous quarters as the company had failed to meet budget for the year.

[59] Those arguments were incorrect for two reasons.

[60] Firstly, the agreed terms for payment of a performance component of Mr Kraan's annual salary were not discretionary or linked to his individual performance and attendance at work. His employment agreement provided for an annual salary with a "base" component and, to be paid quarterly, a "performance" component described as a "KPI based performance incentive". The formula for calculation of that incentive comprised three defined elements drawn from the company's gross revenue, gross margin and earnings (before interest, taxes, depreciation and amortisation) in the relevant quarter. Provided the amounts applied in that formula

were high enough to generate an incentive payment for that quarter, payment was due. There was no provision for the payment to be at the company's discretion or subject to Mr Kraan's personal performance or attendance at work. If the company made it, he made it.

[61] Secondly, Mr Kraan was continuing to work in the 1 April to 30 June quarter until his unjustified suspension. Some of what he was working on was listed in his 5 March resignation letter and his 26 April email to Mrs Chambers. A fair and reasonable employer could not have denied him the benefit of the performance component of his salary as a result of its own actions in stopping him from attending to his duties from 26 April to 4 August.

Remedies for the personal grievance of unjustified disadvantage

[62] Mr Kraan established he had a personal grievance for the three identified instances of unjustified disadvantage to him. He had not established a grievance for unjustified dismissal. As a result no remedy for lost remuneration after the end of his employment, from 4 August until he started a new job on 1 November 2017, was available to him.

[63] He was entitled to an assessment of the remedy of compensation for humiliation, loss of dignity and injury to feelings caused by the three established unjustified disadvantages.

[64] He also sought compensation for loss of the benefit of use of the company vehicle and a company mobile phone following his suspension on 26 April and, in closing submissions, for special damages comprising extra legal costs incurred in dealing with the events that amounted to unjustified disadvantages.

Compensation for humiliation, loss of dignity and injury to feelings

[65] The effects on Mr Kraan of each of the three disadvantages could not realistically be considered separately. The unjustified actions of TAL in the period from 26 April to 4 August were really a course of conduct for which one amount of compensation under s 123(1)(c)(i) of the Act had to be assessed and ordered. The assessment excludes any upset Mr Kraan felt about the end of the employment itself

as this has been determined not to be an unjustified dismissal but the result of his own decision and action.

[66] The evidence of Mr Kraan and Ms Walter confirmed TAL's unjustified actions, comprising the three established disadvantages, caused upset and injury to his feelings during the relevant period. He described himself as "gutted" by Mr and Mrs Chambers not trusting what he said over the issue of documents on his computer and the implication that he was "trying to steal their information". His abrupt suspension also prevented a dignified exit from the role, with formal goodbyes to staff he had worked with over the previous three years. He suffered insomnia and distress during the weeks of wrangling over the computer and pay issues.

[67] Weighing the particular circumstances of this case, and the general range of awards, \$9,000 was an appropriate amount to order TAL to pay to Mr Kraan as compensation for the distress caused to him by the three unjustified disadvantages.

Compensation under s 123(1)(c)(ii) of the Act for loss of any benefit

[68] None of the three elements in this aspect of Mr Kraan's claim warranted an award of compensation.

[69] Mr Kraan's evidence established he lost the use of a company vehicle as a result of his own decision or action, not the result of a demand on him by TAL. He gave his company car to a new employee who had arrived in New Zealand in April. He could have made other arrangements for that employee. No compensation was due for the resulting loss of use of the vehicle.

[70] Mr Kraan's employment agreement provided for him to have "business use" of a mobile phone. Although not contractually entitled to personal use of the phone, Mr Kraan submitted he lost the benefit of its use during his suspension and TAL should pay him a "nominal sum" of \$300 for it. While there was a technical argument that the value of personal use was something he could, in the wording of s 123(1)(c)(ii) of the Act, "reasonably have been expected to obtain if the personal grievance had not arisen", it was a *de minimus* claim in the context of his entire substantive case. No award of compensation has been made on that ground.

[71] Mr Kraan relied on dicta in the Employment Court decision in *Stormont v Peddle Thorp Aitken Limited* to submit he should also be awarded special damages for additional financial loss (in the form of legal costs incurred) in relation to the computer issue and the performance payment.⁵ This remedy was not specifically pleaded in Mr Kraan’s statement of problem or quantified in his evidence or closing submissions. However if those technical shortcomings in the pleadings and evidence were put aside, and a special damages award of the type sought was generally available, the claim nevertheless failed on the particular circumstances of this case. This was because those circumstances lacked what the Court referred to as a “bright line” between his costs of legal representation in the period from 26 April to 4 August, when the disadvantages occurred, and legal costs incurred later, with the same representative, in lodging and pursuing proceedings in the Authority over both those matters and Mr Kraan’s unsuccessful claim of unjustified dismissal. The appropriate balance needed to be set in resolution of costs for the whole matter, if the Authority is later called upon by the parties to determine that matter for them.

Reduction for contributory behaviour

[72] Having awarded Mr Kraan a remedy of \$9000 compensation under s 123(1)(c)(i) of the Act, s 124 required consideration of whether any reduction of that amount should be made due to actions by Mr Kraan that contributed towards the situation giving rise to his grievance.

[73] If Mr Kraan had succeeded in his unjustified dismissal claim, there were actions by him, prior to giving notice on 5 March, that would have been considered under s 124. However the grievance for which he was awarded a remedy related only to disadvantages that arose after 5 March. Blameworthy actions by him had not contributed to the situation of TAL unjustifiably suspending him, making unreasonable demands over the computer issue or withholding the performance component of his salary. No reduction of the s 123 remedy was required.

Wage arrears and the counterclaim

[74] Mr Kraan established two grounds on which he was entitled to an order for payment of wages arrears. The first concerned a shortfall in the amount he was paid under a term of his employment agreement allowing TAL to invoke a restraint on his

⁵ [2017] NZEmpC 71 at [96].

post-employment activity. The second concerned its failure to pay him the performance payment component of his salary for the period from 1 April to 4 August 2017.

The restraint payment

[75] Mr Kraan's employment agreement with TAL included "protection of business" clauses. These included an option for TAL to restrain him from working for a competitor business for up to three months after his employment agreement was terminated. If TAL opted to invoke that restraint, another clause required TAL to then pay Mr Kraan the value of one month of his "normal salary".

[76] In early May Mr Kraan's lawyer asked whether TAL intended to invoke the restraint provision but the company did not confirm it wished to do so until shortly after his employment ended on 4 August.

[77] TAL paid Mr Kraan the sum of \$10,833.16 on 9 August. It considered this amount, which was the value of one month of Mr Kraan's base annual salary, was sufficient to trigger the restraint provision. However Mr Kraan said it did not include payment for the performance component that was part of his "normal" salary referred to in the relevant term in his employment agreement. He calculated the shortfall, using his earnings for the 2017 financial year, was \$9,140.17.

[78] At the investigation meeting Mr Chambers and Mrs Chambers each conceded, during their oral evidence, that the performance component was part of Mr Kraan's "normal" salary. As a result this should have been paid to him when TAL invoked the restraint clause.

[79] The amount of \$9,140.17 was not challenged in the evidence of Mr and Mrs Chambers or TAL's submissions as being a correct calculation of the shortfall in the payment. Accordingly, it has been accepted for the purposes of this determination as the amount of the shortfall in what TAL had to pay Mr Kraan when the company invoked its restraint clause.

The counterclaim over the restraint payment

[80] TAL raised a counterclaim about the restraint payment. If successful it would have excused the company from paying the \$9,140.17 performance element and led to an order for repayment of the \$10,833.16 TAL had paid Mr Kraan when it invoked the restraint.

[81] However the counterclaim could not succeed because TAL's evidence failed to establish Mr Kraan had not honoured the relevant requirements of the restraint clause. Although a letter sent by TAL's lawyer on 27 September 2017 said he was "now working for one of my client's competitors" Mr Chambers accepted during questioning at the Authority investigation meeting that he had no evidence Mr Kraan had not abided by the restraint. He said he "just had a lot of talk in the industry" that Mr Kraan was working for another scaffold company.

[82] Mr Kraan's own evidence revealed during the three-month restraint period he had canvassed some industry contacts about the prospect of getting work once the restraint expired in early November 2017. Having such discussions was not a breach of the agreed term. In the wording of that term he had not carried on or been engaged in or held an interest in a business competing with TAL's business. The job he began on 1 November was not with a TAL competitor.

Performance payments due for the period from 1 April to 4 August 2017

[83] For reasons already given at paragraphs [60] and [61] of this determination Mr Kraan was entitled to have calculated and be paid the performance components of his annual salary due for the period from 1 April to 4 August 2017.

[84] Mr Kraan did not have TAL's financial figures for the period after he was suspended so quantified his claim on the basis of previous results. He calculated he would have been entitled to a payment of \$29,000 for 1 April to 30 June quarter and for a third of that sum for the part quarter from 1 July to 4 August 2017. This totalled \$38,666.66. He sought an order for payment of that amount along with the holiday pay and KiwiSaver loading due on it. The KiwiSaver contribution, listed on his final pay slip, was at the rate of 3 per cent. The holiday pay calculation would add a further 8 per cent. Applying those percentages, the amount to be added for KiwiSaver

was \$1,159.99 and for holiday pay was \$3,093.33. The gross total was therefore \$42,919.98.

[85] The evidence of Mr Chambers and Mrs Chambers focussed on why they believed Mr Kraan was not entitled to the payments. Regarding the actual amount of the performance payment, if it were required to be paid, Mrs Chambers only said the financial results for the business had “softened” during the period to which it applied. Mr Chambers said he expected Mr Kraan would have received “a lot less than in previous quarters”. Neither their evidence nor TAL’s closing submissions provided an alternative calculation using the relevant formula in the employment agreement, although the company had full access to the necessary information to do so. In those circumstances Mr Kraan’s evidence and calculation has been preferred in making the order for payment of wage arrears due to him for performance payments as part of his annual salary up to the end of his employment.

Interest

[86] TAL’s failure to pay Mr Kraan, when due to him, the amounts now ordered in wage arrears meant he was entitled to an award of interest for loss of use of that money in the meantime. Interest on those amounts must be calculated at the annual rate of five per cent from 5 August 2017 to the date payment is made. Mr Kraan’s wage arrears claim was made before the relevant provisions of the Interest on Money Claims Act 2016 came into effect earlier this year. The Judicature (Prescribed Rate of Interest) Order 2011 still applied to the calculation of interest in this case.

A penalty for non-payment of wages and holiday pay

[87] Every party to an employment agreement who breaches that agreement is liable to a penalty under the Act.⁶ TAL breached its agreement with Mr Kraan by failing to pay the performance element on his annual salary for the period from 1 April to 4 August 2017 and its late payment of the performance element for the previous quarter. In failing to pay the performance element of the salary for the last full quarter and the part quarter to the end of Mr Kraan’s employment, TAL also failed to pay the holiday and KiwiSaver loadings that applied to that amount.

⁶ Employment Relations Act 2000, s 134(1).

[88] These failures were the subject of correspondence exchanged between the parties from at least 28 August 2017. They had not been rectified by the time of the Authority's investigation meeting on 26 March 2018. The failures could not fairly be said to have occurred inadvertently or carelessly. Rather TAL had deliberately and wrongly taken this position of depriving Mr Kraan of a significant portion of the total remuneration he was contractually entitled to receive. A penalty was warranted to punish TAL and deter other employers from acting in the same way.

[89] Mr Kraan submitted the breaches involved should draw a total of penalty of \$25,000. Although the steps routinely applied in setting penalties might lead to a prospective award at that level, an assessment of proportionality would require a substantial downward adjustment when compared to other similar cases.⁷

[90] Having made that comparison and adjustment \$5000 was the appropriate level of penalty to impose on TAL for its breaches of its contractual obligations to Mr Kraan. The penalty is to be paid to the Authority for transfer to the Crown account. Mr Kraan had sought an order for some or all of any penalty awarded to be paid to him. However the breaches regarding payments due to him have been remedied by the orders made in this determination, including an order for interest. The breaches were not of a kind that resulted in a non-compensable loss or of other loss that a later costs award might not adequately compensate.⁸

Costs

[91] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Kraan may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum TAL would then have 14 days to lodge any reply memorandum.

[92] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

⁷ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 at [137]-[151].

⁸ *Borsboom*, above n 7, at [150].

[93] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Robin Arthur
Member of the Employment Relations Authority

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.