

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 106  
5365456

BETWEEN

JEETAN PARBHU  
Applicant

AND

ARMSTRONG PRESTIGE  
WELLINGTON LIMITED  
Respondent

Member of Authority: Michele Ryan

Representatives: Paul McBride, Counsel for the Applicant  
Penny Shaw, Counsel for the Respondent

Investigation Meeting: 24 July 2012

Submissions Received: 30 July and 14 August 2012 from the Applicant  
7 August 2012 from the Respondent

Determination: 24 September 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Armstrong Prestige Wellington Limited (Armstrong Prestige) specialises in the sale of a range of luxury cars. It is one of a one of a group of seven companies which form the Armstrong Motor Group. Mr Rick Armstrong is Managing Director of each of the seven companies.

[2] Mr Parbhu was first employed as a motor vehicle salesperson in late 2007 for Armstrong Wellington Limited. In May 2009 Mr Parbhu commenced employment with Armstrong Prestige.

[3] Mr Parbhu alleges that he was pressured by Armstrong Prestige to vacate his position as a brand manager and return to a sales representative position. He says that

when he resisted his employer's demands he was dismissed. Mr Parbhu says he was simply replaced by an employee that the Managing Director wished to place into his role and that his role was not genuinely redundant.

[4] In contrast, Armstrong Prestige says that Mr Parbhu resigned from his position as a result of restructuring of the company in Wellington and that its restructuring was legitimate.

### **The Authority's investigation**

[5] In December 2011 the parties were directed to mediation but did not settle the matter. The Authority convened a teleconference on 22 February 2012 and it was agreed that an investigation meeting would be conducted on 24 July 2012.

[6] On 11 June 2012 the Authority was advised that Armstrong Prestige's managing director, Mr Rick Armstrong, would be in Europe at the time of the Authority's investigation meeting. The Authority made inquiries as to when Mr Armstrong made travel bookings but no response was provided to that request. The Authority declined to allow an adjournment in those circumstances.

[7] On 19 July 2012 the representative for the respondent communicated that Mr Armstrong remained in Europe and would not be available to give evidence in person but that he would be available by telephone.

[8] On 20 July 2012 the Authority advised that it would not deal with Mr Armstrong by telephone but suggested that Armstrong Prestige arrange for video conferencing so that Mr Armstrong could be questioned on issues, or alternatively that Mr Armstrong provide a signed affidavit as to his evidence. It was noted however that limited weight would be given to his evidence in circumstances where he could not be questioned or cross-examined.

[9] On 22 July 2012 Armstrong Prestige advised that Mr Armstrong would be available by Skype. The Authority does not have Skype facilities but provided information as to what equipment the respondent needed to arrange to undertake a Skype conference. On the morning of the investigation meeting, the respondent's representative advised that they were unable to obtain the necessary equipment to undertake the Skype teleconference.

[10] The Authority had previously been provided with an unsigned brief of evidence by Mr Armstrong. In these circumstances I am unable to give weight to his evidence although where necessary I have referred to information contained within his statement to give context to events which led to Mr Parbhu leaving his employment.

### **Relevant background information**

[11] Mr Parbhu's 2009 individual employment agreement records his position as "Landrover, Volvo and Jaguar Brand Manager". His employment agreement provided that he be paid a retainer of \$47,000 per annum, plus commission, as well as reasonable unrestricted private use of a motor vehicle.

[12] On 1 September 2011 Mr Parbhu attended a work related drinks function hosted by Mr Armstrong.

[13] Also present at the function was Mr Simon O'Reilly, an employee of Armstrong Presitige Christchurch Ltd, a company which is part of the Armstrong Motor Group. Mr O'Reilly gave evidence at the Authority's investigation and attests that some weeks prior to 1 September 2011 he had given his direct manager notice of resignation and had accepted an offer of employment with a Mercedes Benz dealership in Brisbane, Australia. He says he wanted to move away from the ongoing stress and disruption caused by the Christchurch earthquakes. Soon after he gave notice he was approached by managing director Mr Armstrong, who asked him to consider moving to Wellington and continue working within the Armstrong Motor Group. Mr O'Reilly travelled from Christchurch on 1 September 2011 to meet with Mr Armstrong and discuss further the possibility of working for Armstrong Prestige Wellington Limited. He says he was not provided with exact detail as to the role he might take up but does concede that Mr Armstrong talked about Mr O'Reilly managing the "Motor Corp" brands of cars. The Motor Corp brands of cars include Jaguar, Volvo and Landrover.

[14] At the time Mr Parbhu's employment concluded, Mr Conneely held the position of Wellington General Manager of Armstrong Prestige. He reported directly to Mr Armstrong and was 'second-in charge' with overall responsibility for the Wellington based business. He says it was usual for Mr Armstrong to discuss with him any operative changes within the business.

[15] Mr Conneely was summonsed to attend the Authority's investigation. He advised he was no longer employed by Armstrong Prestige and had been made redundant in May 2012. He reports there are no legal proceedings in relation to his redundancy.

[16] Mr Conneely described Mr Armstrong in the following terms:

[Mr Armstrong] is a strong personality. He comes into the room and the room isn't big enough for him. In a sense he *was* the business. Mr Armstrong has a big personality and he doesn't like people to frustrate his plans. When he gets an idea and he's going to do it, then he does it. It does not matter what anyone else says or does."

### ***Meetings and correspondence***

[17] On 5 September 2011 and again on 9 September 2011 Mr Parbhu met briefly with Mr Armstrong and Mr Connelly. Both meetings were called at short notice and he was not advised of the purpose of either of the meetings. Mr Parbhu says that on each occasion Mr Armstrong requested he step aside from the brand management role and urged him to return to a salesperson's role. Mr Parbhu refused to relinquish his position.

[18] On 15 September 2011 Mr Parbhu met with Mr Armstrong again to formally discuss Mr Armstrong's request. Mr Parbhu brought his friend Mr Peter McLaren, an experienced HR and management consultant. Mr Parbhu, Mr Conneely and Mr McLaren all gave similar and corroborating evidence as to the contents of the meeting. Each say Mr Armstrong advised Mr Parbhu that he was to stand down from his role as a brand manager and return to a salesperson's role. During the discussion Mr Armstrong criticized Mr Parbhu's suitability for the brand manager's position, and told him he did not have the "*killer instinct*" and that he was not a "*clone*" of [Mr Armstrong]. The witnesses were also consistent with their description of Mr Armstrong's concession during the meeting that he was aware he had gone about the process to have Mr Parbhu vacate his position the "*wrong way*" and that "*it would cost money but that [he] did not care*". Each witness attested that it was clear Mr Armstrong had made his decision to remove Mr Parbhu from his current position and that Mr Armstrong was becoming increasingly irritated with Mr Parbhu's resistance to surrender his position as brand manager.

[19] A further meeting was held between Mr Armstrong and Mr Parbhu on 19 September 2011, with Mr Conneely in attendance. Mr Parbhu was again asked to step down from his position but again refused to do so.

[20] On 20 September 2011 Mr Armstrong wrote to Mr Parbhu and advised that Armstrong Prestige was “*looking to undertake restructuring ...which would result in an expansion of the role of Sales Manager to include used cars*”. The letter referred to perceived difficulties Mr Parbhu had with managing staff and asked Mr Parbhu to provide any final comments he had with regard to the change to the role of sales manager by 5pm on Friday 23 September 2011. The letter stated that if the changes proceeded then Mr Parbhu could take up a position of Sales Representative on his then existing terms and conditions.

[21] Mr Conneely and Mr Parbhu were both emphatic in their respective testimony that prior to Armstrong Prestige’s correspondence of 20 September 2011 there had been no suggestion by Mr Armstrong of an intention to restructure Mr Parbhu’s brand manager’s role.

[22] Mr Parbhu says that in the week commencing 19 September 2011 he was advised by several sources including an external distributor that he was being replaced by Simon O’Reilly. Mr Parbhu reports that the distributor said he had informed of the eventuality by Mr Armstrong directly.

[23] On 23 September 2011 Mr Parbhu via his solicitors wrote to Mr Armstrong and raised concerns as to the process undertaken by Mr Armstrong and sought an exit package in exchange for agreement to relinquish his role. Alternatively he requested the parties attend mediation. Mr Conneely’s evidence is that later that day he was advised by Mr Armstrong over the phone of a letter received from Mr Parbhu’s lawyer and told that Mr Parbhu had resigned. Mr Conneely says that during that telephone conversation Mr Armstrong instructed him to remove Mr Parbhu from Armstrong Prestige Wellington premises. He says he relied on the information given to him by Mr Armstrong, and his understanding was that “*Mr Parbhu would not be coming back*”.

[24] Mr Parbhu says that shortly before 5pm on Friday 23 September 2011 he was approached by Mr Conneely and told to “*go now*” and that “*there is no point in [you] being here anymore*”. Mr Parbhu asked if he was dismissed. He says Mr Conneely

denied that he had been dismissed but told Mr Parbhu that he was “*suspended*” and/or on “*garden leave*”. Mr Parbhu adjourned the discussion and called his solicitor following which Mr Conneely directed Mr Parbhu to leave the workplace. Mr Parbhu was given use of a car to place his belongings and left the premises soon after.

[25] On 29 September 2011 Mr Parbhu received a telephone call from Mr Conneely. He says Mr Conneely advised “*you are no longer with the company*” and requested the car be returned. On the same day, by letter, Mr Parbhu asked for confirmation that he had been dismissed and requested the parties attend mediation.

[26] Mr Parbhu did not receive a reply from Armstrong Prestige to his various correspondence of September 2011 until 13 October 2011 via Armstrong Prestige’s representative. That letter advised, amongst other things, that Armstrong Prestige had “*created a new Sales Management role which incorporated responsibility for used cars*” The letter further stated:

This was a genuine restructuring and Mr Parbhu was offered ongoing employment on his existing terms and conditions, which he refused to accept. Mr Parbhu’s refusal to accept ongoing employment was the reason his employment came to an end. The termination of Mr Parbhu’s employment has been treated by my client as a resignation and any dismissal is denied.

[27] Mr O’Reilly’s evidence is that on or about 15 September 2011 he accepted Mr Armstrong’s verbal offer of employment. He left Christchurch on 21 September 2011 and moved to Wellington.

[28] On 26 September Mr O’Reilly commenced working for Armstrong Prestige Wellington. On 30 September 2011 Mr O’Reilly signed an individual employment agreement.

[29] Mr Parbhu claims he has been unjustifiably dismissed. He also says he was unjustifiably disadvantaged by his suspension on 23 September 2011 and that he was discriminated against when he raised he raised various personal grievance claims on the same date. He says Armstrong Prestige was in breach of its obligations of good faith during the process which led to his dismissal.

## **Issues**

[30] The issues for investigation and determination by the Authority are as follows:

- Was the redundancy of Mr Parbhu's position genuine?
- Was the process adopted by Armstrong Prestige procedurally fair and consistent with good faith obligations?
- Was Mr Parbhu unjustifiably disadvantaged and/or discriminated against by his suspension on 23 September 2011 from the workplace?
- Did Armstrong Prestige breach its obligations of good faith and if so should penalties be awarded against it?

***Was Mr Parbhu's position genuinely redundant?***

*The relevant law*

[31] When assessing an employer's decision to make an employee redundant, historically the approach of the Authority and the Court has been to consider two factors; the genuineness of the redundancy and whether the redundancy was carried out in a procedurally fair way<sup>1</sup>. That approach was endorsed relatively recently in *Simpsons Farms Ltd v Aberhart*<sup>2</sup> where Cogan CJ noted at [67], in response to legislative changes as regards justification for dismissal and/or disadvantage actions that:

*I do not consider that the recent statutory changes were intended to revisit long standing principle about substantive justification for redundancy exemplified by judgements such as Hale...*

*So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make...*

[32] As with any allegation of unjustified dismissal, the onus is on the employer to demonstrate, pursuant to s.103A of the Employment Relations Act, that its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred<sup>3</sup>. As a consequence Armstrong Prestige is required to justify its conclusion that Mr Parbhu's position was genuinely redundant as a decision that that a fair and reasonable employer could make.

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<sup>1</sup>GN Hale & Son Ltd v Wellington, etc Caretakers, etc, IUOW (1990) 3 NZELC 97,985;

<sup>2</sup> [2006] ERNZ 825; (2006) 7 NZECL 98,450

<sup>3</sup> Section 103A Employment Relations Act 2000

*Armstrong Prestige's position*

[33] Armstrong Prestige refers to clause 20 of Mr Parbhu's employment agreement which, amongst other things, defines the circumstances in which his position would be considered redundant, as follows:

20. Redundancy

Where, either:

- (a) your position is no longer required, or
- (b) your position or its requirements permanently change to such an extent that you are unable to fill the position in a manner satisfactory to us, then:

We will consult with you with the objective of exploring possible alternative to termination. If we are unable to find an alternative position we will provide you with notice of termination of employment which will be at least that specified in the Second Schedule. Your employment will terminate at the expiry of the notice period or earlier where we do not require notice to be worked out we would pay you in lieu of notice.

[34] Armstrong Prestige submits that it created a new role which required duties beyond those Mr Parbhu was employed to do. It says Mr O'Reilly's position was a "pure" management role in that he was responsible for leadership and management of a sales team. Armstrong Prestige says in contrast to duties Mr Parbhu was required to perform, Mr O'Reilly is not required to engage in or have direct engagement with sales. Further, Armstrong Prestige submits that a large portion of Mr O'Reilly's role is to grow Motorcorp used car sales and states that Mr Parbhu's role was not extensively involved in used car sales.

[35] Armstrong Prestige refers to the difference in remuneration between Mr Parbhu, who received a base salary of \$47,000 per annum plus commission, to that of Mr O'Reilly's remuneration of \$90,000 per annum plus commission. Armstrong Prestige says that the significant difference between the remuneration of Mr Parbhu and Mr O'Reilly is a compelling factor which evidences Mr O'Reilly's position as substantially different to the position held by Mr Parbhu.

[36] The Authority was provided with copies of Mr Parbhu's employment agreement and job description and those of Mr O'Reilly. Both position descriptions are almost identical with the exception of (a) the remuneration packages outlined in the respective agreements, (b) Mr Parbhu's "position objective" states he was responsible for achieving "*budgeted Landrover, Volvo and Jaguar car sales volume*"

whereas Mr O'Reilly is responsible for "*budgeted sales volume for new and used Landrover, Volvo and Jaguar car sales*"; and (c) Mr O'Reilly's position description advises of a "functional relationship" with "sales managers" which Mr Parbhu's position description did not. In all other respects, including 5 listed "key tasks" and 20 "expected results" the job descriptions are indistinguishable.

[37] As regards the similarity in job descriptions between Mr Parbhu and Mr O'Reilly, Mr Armstrong in his statement of evidence explains that he "*was not involved in putting together the documentation including the position description [of Mr O'Reilly]*" and "*it is not an accurate reflection of the role [he] wanted Mr O'Reilly to fill*".

*Determination as to genuineness of redundancy*

[38] Having assessed all the evidence I do not accept Armstrong Prestige's claim that Mr Parbhu's role was redundant according to the definitions contained within his employment agreement. I find that the role undertaken Mr O'Reilly on 26 September 2011 was the role performed by Mr Parbhu up to 23 September 2011. I do not consider that Mr Parbhu's role "*was no longer required*" at the time he was dismissed and when Mr O'Reilly commenced his position.

[39] The law is clear that a redundancy is genuine if the position has become superfluous to the employer's needs and the redundancy relates to an employment position, not the person performing the role<sup>4</sup>.

[40] I consider there is overwhelming evidence that Mr Parbhu was replaced by Mr O'Reilly because Mr Armstrong wished to retain Mr O'Reilly in his employ. In particular I accept Mr Conneely's evidence that Mr Armstrong confided to him on 1 September 2011 that he had offered Mr Parbhu's position to Mr O'Reilly. Mr O'Reilly also acknowledged during questioning that on 1 September 2011 Mr Armstrong had told him that the incumbent, Mr Parbhu, did not object to Mr O'Reilly taking over the Motorcorp brand management role.

[41] Mr O'Reilly's position title is exactly the same as that held by Mr Parbhu as are the tasks he is expected to perform. I reject Mr Armstrong's statement that the position description attached to Mr O'Reilly's signed employment agreement does not reflect Mr O'Reilly's role. Whilst I accept statements made on behalf of Armstrong

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<sup>4</sup> GN Hale & Son Ltd v Wellington, etc Caretakers, etc, IUOW (1990) 3 NZELC 97,985;

Prestige that the position of Landrover, Volvo and Jaguar Brand Manager has developed considerably since Mr O'Reilly commenced working at Armstrong Prestige on 26 September 2011, the Authority is required to assess the dimensions of the role at the time Mr Parbhu's employment terminated. Mr O'Reilly conceded in evidence that at the time he commenced the position, his role was that which Mr Parbhu had performed and I accept Mr Connelly's statement that "*Mr O'Reilly ...was more experienced than [Mr Parbhu] and so did a better job, but it was exactly the same job; there was no difference to it.*"

[42] As regards to the significant difference between Mr Parbhu's and Mr O'Reilly respective base salary's Mr Conneely stated;

*[Mr O'Reilly] got a much better payment package than [Mr Parbhu] ...The reason for this was simply because [Mr Armstrong] wanted him, come hell or high water. They had to pay him \$90,000 just to get him. To be fair, he had more experience, but he was doing the same job.*

[43] I accept Mr Conneely's testimony in this respect. It was apparent from evidence given to the Authority that Mr Armstrong was willing to have Armstrong Prestige pay the cost of Mr O'Reilly's flights and belonging transported to Wellington and for inner-city accommodation for three months following commencement of Mr O'Reilly's employment at Armstrong Prestige. In these circumstances I do not regard the disparity between Mr Parbhu's and Mr O'Reilly's remuneration as a determinative factor such that it would persuade me to find that Mr O'Reilly was employed to perform an entirely different position. It is clear from the information provided to the Authority that Mr Armstrong was determined to persuade Mr O'Reilly away from progressing his employment offer in Australia and that Mr Armstrong was willing to remunerate Mr O'Reilly in such a way so as to ensure he remained employed within the Armstrong Motor Group.

[44] I also reject Armstrong Prestige's submission that, by its offers to return Mr Parbhu to a sales representative position Armstrong Prestige it had not, by its actions, made Mr Parbhu redundant. Statutory obligations of good faith include a requirement on employers to redeploy an employee to an alternative position if one exists and the employee is able to perform the role<sup>5</sup>. In Mr Parbhu's circumstances, his employment agreement expressly provided that Armstrong Prestige would explore possible alternatives to termination. However, whether by operation of law or by contract,

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<sup>5</sup> *Wang v Hamilton Multicultural Service Trust* [2010] NZEmpC 142

Armstrong Prestige's obligation to redeploy Mr Parbhu to an alternative position, arose only after Mr Parbhu's position had, following consultation, been assessed as superfluous to its needs.

[45] I conclude that when viewed collectively and for the reasons set out above I am compelled to find that Mr Parbhu's position was not genuinely superfluous to Armstrong Prestige's needs but rather that Mr Armstrong wished to replace Mr Parbhu by an employee who was more experienced and whom he preferred. I find that these were not actions open to a fair and reasonable employer in the circumstances at the time they occurred. Mr Parbhu has a personal grievance for unjustified dismissal.

***Was the decision to make Mr Parbhu redundant procedurally fair and made in good faith?***

[46] If however my assessment of the genuineness of Mr Parbhu's redundancy is wrong, I am not satisfied that the processes undertaken by Armstrong Prestige as they related to Mr Parbhu's redundancy were actions that were open to a fair and reasonable employer. The application of s.103A to personal grievance claims where redundancy is at issue was described in *Simpsons Farm's Limited v Aberhart*<sup>6</sup>

*[65] ...The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because and fair and reasonable employer will comply with the law.<sup>7</sup>*

...

[47] Armstrong Prestige did not produce any contemporaneous documentation in respect to its purported proposal to disestablish the position held by Mr Parbhu or to support its claim that it had wished to create a new managerial position. Mr Armstrong in his unsigned brief of evidence sought to explain the lack of records as a reflection of his management style. He says stated that "*restructuring is usually undertaken in relatively informal way...I meet with staff to discuss things with them rather than writing letters and it has not been...the practice within the business at any time to have someone take notes of any of my meetings.*" His evidence is that he rarely uses a PC and does not create documents that relate to employees. He says for

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<sup>6</sup> Ibid at 2.

<sup>7</sup> Note: the reference to s103A was the test of justification as it was prior to 1 April 2011.

all these reasons “*there is limited documentation relating to the circumstances of the restructure involving Mr Parbhu’s role.*”

[48] Whilst there is no absolute requirement for an employer to create documentation so as to evidence plans to restructure its business, the onus is on the employer, if challenged, to evidence both the genuineness of a restructuring and the process it undertook as fair and reasonable.

[49] Armstrong Prestige submits it met with Mr Parbhu on at least four occasions to discuss his continued employment on the same terms and conditions as his position of Brand Manager. I reject any inference from those submissions that Armstrong Prestige genuinely consulted in good faith a proposed restructure. Section 4(1A)(c) requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on an employee’s continuation of employment, must provide to the employee access to information relevant to the continuation of employment about the decision and an opportunity for the employee to comment on the information before a decision is made.

[50] Mr Armstrong states that over the course of the meetings held with Mr Parbhu he discussed his views that he was not suitable for an expanded managerial role. The evidence of the witnesses who attended those meetings and the Authority’s investigation is that Mr Armstrong did express his dissatisfaction with Mr Parbhu’s management of staff. However the evidence of both Mr Conneely and Mr Parbhu is that there was no mention at all of any restructuring throughout those exchanges. Their evidence is consistent. The meetings were held with the predominant purpose to persuade Mr Parbhu to relinquish his current position and return to a sales representative role. I am not persuaded that Mr Armstrong advised Mr Parbhu of any proposals to create a managerial role or that he was considering disestablishing Mr Parbhu’s current role.

[51] I also am not persuaded that any procedural flaws associated with Armstrong Prestige’s consultation process were rectified by its letter to Mr Parbhu of 20 September 2011. That letter commences with the following statement:

As discussed with you on a number of occasions, including with a representative present, I am looking to undertake restructuring at Armstrong Prestige / Motorcorp Division which would result in an expansion of the role of Sales Manger to also include used cars...

...Could you please let me know any further thoughts about my proposal to change the role of Sales Manager...

[52] Mr Parbhu submits that the correspondence of 20 September was a belated attempt to re-write history as to matters discussed at previous meetings. Given the weight of evidence provided by the other attendees to those meeting I agree with his appraisal. I also find that the contents of the letter were misleading. Armstrong Prestige's assertion that it was seeking to obtain Mr Parbhu's response to its proposal to expand the role of brand manager is inconsistent with Mr O'Reilly's testimony that he had verbally accepted the offer to perform that role on 15 September 2011. There is simply no evidence to support Armstrong Prestige's claim that it genuinely consulted with Mr Parbhu prior to making a decision to remove him from his position.

[53] Even if I had found that Mr Parbhu's redundancy was genuine in a commercial sense, I consider the process undertaken by Armstrong Prestige, with obligations to act in a procedurally fair manner and in good faith was so fundamentally deficient that Mr Parbhu's dismissal would be found to be unjustified on procedural grounds alone.

***Was Mr Parbhu unjustifiably disadvantaged and/or discriminated against?***

[54] Mr Parbhu claims he was unjustifiably disadvantaged by Armstrong Prestige's attempts to force him to stand down from his position. I decline to make findings in respect to this aspect of his claims on the basis that the actions complained of are intrinsically linked to the matrix of actions in which the Authority has already determined were unjustifiable and which has resulted in a successful claim for an unjustified dismissal.

[55] Mr Parbhu also says he was unjustifiably disadvantaged by Armstrong Prestige's actions to unfairly suspend him from the workplace and that he was discriminated against by Armstrong Prestige's actions in removing him from the workplace as a consequence of Mr Parbhu's "*involvement in the activities of a union*".

[56] Section 103(1)(c) of the Act provides that a personal grievance includes a claim where an employee has been discriminated against in the employees employment.

[57] Section 104 states:

*(1) For the purposes of section 103(1)(c), an employee is discriminated against in the employee's employment if the employee's employer...by reason directly or indirectly of ...involvement in the activities of a union in terms of section 107,-*

*...*

*(b) dismisses that employee or subjects the employee to any detriment, in circumstances in which other employees employed by that employer...are not or would not be dismissed or subjected to such a detriment;*

*(2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[58] Section 107 defines, for the purposes of s104, that "*involvement of the activities of a union*" includes circumstances where an employee has within 12 months before the action complained of, raised a personal grievance with his or her employer. When discrimination is alleged on grounds of "*involvement in the activities of a union*", s.119(2) provides a rebuttable presumption that the employer did discriminate against the employee on the grounds alleged. As a consequence the onus lies with the employer to establish on the balance of probability that it did not discriminate against the employee on grounds of union activity.

[59] It is not disputed that Mr Parbhu was told in the late afternoon of 23 September 2011 by Mr Conneely and that he was suspended and/or on garden leave. Mr Parbhu says this action caused a detriment to him as it prevented him from opportunities to earn commission. Mr Conneely's evidence is that he had previously spoken to Mr Armstrong on the phone who indicated he had received correspondence from Mr Parbhu's solicitor that Mr Parbhu had resigned Mr Conneely was told to "*get him off my premises*". I do not accept Armstrong Prestige's submission that Mr Conneely acted independently from Mr Armstrong to remove Mr Parbhu from the workplace.

[60] I find that the component parts of the statutory requirements as they relate to raising a personal grievance on the basis of discrimination by reason of involvement of the activities of a union are made out. Mr Armstrong did not attend the Authority's investigation or provide information to justify the decision to suspend or sufficiently rebut the presumption that Mr Parbhu was suspended because he had raised a

grievance pursuant to s.104. As a consequence I find Mr Parbhu was discriminated against in his employment by reason of his involvement in union activities.

[61] Mr Parbhu claims also he was unjustifiably disadvantaged by his suspension. I conclude that the procedure undertaken to suspend Mr Parbhu did not comply with minimum statutory requirements set out at s103A(3) in that Mr Parbhu was not advised that his employer was considering his suspension from the workplace nor was Mr Parbhu given a genuine opportunity to respond on the matter. Mr Parbhu's suspension was simply communicated to him as an ultimatum. I conclude that Mr Parbhu has a personal grievance as regards an unjustified disadvantage as a consequence of his suspension.

### **Remedies**

[62] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. That section is qualified by s.128(2) which, subject to any reduction that the Authority may make under s.124 for contributory behaviour, provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration, or 3 months' ordinary time remuneration.

[63] Mr Parbhu's position as brand manager was not genuinely redundant. In these circumstances Mr Parbhu is entitled to remedies for loss of remuneration and benefits associated with the loss of the position as well as compensation for the process undertaken by Armstrong Prestige resulting in his unjustifiable dismissal, unjustified disadvantage and discrimination. I am satisfied that Mr Parbu did not in any way contribute to the situation which gave rise to his personal grievances.

[64] Mr Parbhu claims substantial remedies totalling \$149,472. These include claims for reimbursement of \$5,543. for unpaid commissions he says was owed at the time of his dismissal, compensation of \$3,400. as lost commission during his notice period of one month and compensation of \$31,200. as the sum he estimates he would have earned (in both base salary and commission) from the date his notice period ended until the date of the Authority's investigation.

[65] He seeks compensation of \$34,599.96 for future lost earnings for a further 12 months after the Authority's investigation and \$25,000. as compensation for past and future loss of the use of a motor vehicle.

[66] Mr Parbhu requests \$50,000. as compensation for humiliation and loss of dignity associated with his collective personal grievances.

[67] Mr Parbhu asks for interest to be awarded on the sums referred to.

***Loss of remuneration***

[68] Mr Parbhu obtained alternative employment on 24 October 2011 on a retainer of \$50,000. per annum although he says the retainer reduced to \$30,000. after three months. Mr Parbhu does not appear to have lost remuneration as regards to his retainer between the date of his dismissal and commencement of his new position.

***Past commission***

[69] Mr Parbhu says he is owed \$5,543.00 in unpaid commission associated with the sale of five luxury cars at the time of his dismissal. In contrast Armstrong Prestige says commission on sales is not paid until the whole sale process is completed and that while Mr Parbhu may have commenced some sale transactions he did not conclude those sales. Armstrong Prestige refers also to clause 19. of Mr Parbhus's employment agreement. The material portions of that clause state:

In the event of termination of your employment, the following conditions will apply:

Where notice is given by either of us, it shall be no less and no more than the period specified in the Second Schedule (except in the case of redundancy) unless agreed between the parties:

...

Where following notice given in accordance with Clause 19.1.1 of this agreement we do not require you to work out all or part of the notice period, your employment will terminate at an earlier date nominated by us, in which case payment of your base salary in lieu of the balance of the original notice period will be made. In this case the employment will be deemed to have ended and all benefits, including any right to commission, under this agreement to have ceased on the last day of actual performance of work unless we have specifically agreed otherwise in writing.

[70] Mr Parbhu submits that there is no clause 19.1.1 and therefore by implication the purported notice required to trigger the application of the clause is uncertain and/or void. Alternatively he says neither he nor Armstrong Prestige gave notice. He

says but for his unjustifiable dismissal he would have received full commission and that he should not be deprived of it by Armstrong Prestige's unlawful conduct.

[71] I find on the evidence that the provision of notice required pursuant to Mr Parbhu's employment was not given by Armstrong Prestige nor did Mr Parbhu give notice. I accept Mr Parbhu's claim in this respect and find that Armstrong Prestige cannot rely on clause 19. to justify withholding a portion of Mr Parbhu's remuneration that was due to him.

[72] Mr Parbhu calculates that he is owed \$5,543. in commission earned before he was dismissed.

[73] Mr Armstrong reports in his statement that if commission is owed then it is not at the level claimed by Mr Parbhu, he says the sum of commission due is \$3,182.

[74] Given that Mr Armstrong was not able to questioned or examined as his to estimation of the commission payable, I prefer Mr Parbhu's evidence. Pursuant to s.123(1)(b) I order Armstrong Prestige to reimburse the sum of \$5,543(gross) minus PAYE to Mr Parbhu for commission that was owed to him at the time of his dismissal.

#### *Lost Commission*

[75] Mr Parbhu estimates that in his role of Brand Manager he received approximately \$850. (gross) per week in commission payments. Armstrong Prestige does not dispute Mr Parbhus's estimation in this respect.

[76] Mr Parbhu claims that for the 3 months following his dismissal, commission payments would have increased due to changes to the price structure of Jaguar vehicles, the introduction of a new model of Land Rover and the Rugby World Cup event. During the Authority's investigation it was provided a number of General Ledger Performance Analysis Reports including for the 3 month period after Mr Parbhu's dismissal. It is clear that there were increased sales of Motorcorp brand vehicles over this time. Armstrong Prestige explained that these results were a consequence of Mr O'Reilly's expertise and development of its Motorcorp used car business.

[77] Mr Parbhu's employment agreement provided a two tier system for receiving commission whereby he received 10% commission on sales made personally and \$100. for Motorcorp vehicles sold by other staff. There was also some evidence of an alternative system of commission payments which appear to have been in practice at Armstrong Prestige but the Authority was not provided with sufficient detail to make an informed assessment and this system was not recorded in Mr Parbhu's employment agreement.

[78] The general ledger figures given to the Authority estimated commission Mr Parbhu may have received as a result of total sales of Motorcorp brand cars but clearly not commission he would have made if he had conducted the sale. In these circumstances I have reverted back to the estimation of commission accepted by the parties. Pursuant to s.123(1)(c)(ii) I order Armstrong Prestige to pay the sum of \$11,050 (gross) minus PAYE as compensation for lost commission for the three month period following his dismissal.

*Future lost earnings*

[79] Mr Parbhu requests to be compensated the sum equal to lost remuneration for the period between the end of his notice period (28 October 2012) to the date of the Authority's investigation meeting (24 July 2012), and for a further 12 months following the investigation. Mr Parbhu has already been compensated pursuant to s128(2) for commission he anticipated for the period of three months following his dismissal. Section 128(3) allows the Authority to exercise its discretion to order compensation for remuneration beyond three months. In circumstances where Mr Parbhu obtained gainful employment promptly after his dismissal I decline to exercise this discretion.

*Compensation for past and future loss of the use of a motor vehicle*

[80] Mr Parbhu's remuneration schedule whilst employed by Armstrong Prestige provided, inter alia:

We will supply you with a motor vehicle appropriate in your position which must be used in accordance with our current policy. Reasonable unrestricted private use is allowed...Any petrol consumed for out of town private use must be replenished at your own cost.

[81] Mr Parbhu requests compensation of \$25,000. for past and future loss of the benefit of use of a motor vehicle. According to official 2011 Automobile Association estimates for operating a range of cars, a large car valued at \$75,000. when new is \$14,876.76 per annum.

[82] During cross examination Mr Parbhu acknowledged that his current position allows access to and use of show room cars. He says personal use is limited to travel between the workplace and home. I was not provided with a copy of his employment agreement with his new employer.

[83] I regard the personal use of a luxury vehicle was a contractual benefit of employment with Armstrong Prestige however I do not accept Mr Parbhu's claim for future loss. Whilst an imperfect calculation I regard Mr Parbhu is entitled to a portion of the sum equal to the operating costs of a large car for a 3 month period and order compensation pursuant to s.123(1)(c)(ii) of \$1,750.

#### ***Humiliation and distress***

[84] Mr Parrbhu gave evidence as to the humiliation and loss of dignity he felt as a consequence of the unfair process undertaken taken by Armstrong Prestige to remove him from his position which I accept. It is clear from the evidence that Mr Armstrong misled Mr Parbhu as to his intentions and Mr Parbhu's distress was exacerbated as his suspicions that another employee had been engaged to replace him became apparent. Pursuant to s.123(1)(c)(i) I order Armstrong Prestige Wellington Limited to pay to Mr Parbhu the sum of \$12,000. as compensation for his unjustified dismissal.

[85] As regards my findings as to Mr Parbhu's separate claims of unjustified disadvantage, and discrimination by reason of his involvement in the activities of a union, I consider that the effect of both those actions was that he was unfairly suspended from the workplace. In this respect I am unwilling to award compensation to Mr Parbhu for separate claims which resulted in the same consequence. I order Armstrong Prestige Wellington Limited to pay the sum of \$3,000. as compensation for Mr Parbhu's distress arising from the suspension.

#### **Breach of good faith**

[86] Section 4(1) of the Employment Relations Act requires parties to an employment relationship to deal with each other in good faith and not mislead or

deceive each other. Section 4A provides that a party who fails to comply with the duty of good faith is liable to a penalty if the failure was deliberate, serious and sustained.

[87] I find that Mr Armstrong's conduct throughout the four meetings held in September 2011 and his correspondence of 20 September 2011, evidence deliberate, serious and sustained breaches of the statutorily imposed obligations to act towards Mr Parbhu in good faith. Mr Armstrong conducted a purposeful campaign to remove Mr Parbhu from his position. He failed to advise Mr Parbhu that he had employed Mr O'Reilly to assume his position and I find those omissions were calculated, misleading and deceptive. I accept the consistent evidence of all the attendees at the meeting of 15 September (with the exception of Mr Armstrong) that Mr Armstrong acknowledged he was going about the process "*in the wrong way*" but that he was going to pursue those plans despite that awareness.

[88] Mr Parbhu has been compensated for the consequences of Armstrong Prestige's breaches however I consider it is appropriate to impose a penalty against Armstrong Prestige as punishment for its unlawful actions, and to dissuade it repeating such behaviour in the future and to deter other employers from similar conduct. Pursuant to s.4A I order Armstrong Prestige pay \$2,500. to the Crown as a penalty for breach of its good faith obligations.

### **Summary of orders**

[89] Armstrong Prestige Wellington Limited is to pay to Mr Parbhu:

- i. pursuant to s.123(1)(b) the sum of \$5543.(gross) minus PAYE, as reimbursement of commission owed at the time of Mr Parbhu's dismissal, plus 5% interest on that sum from 28 October 2011 to the date of the Authority's investigation meeting.<sup>8</sup>;
- ii. pursuant to s.123(1)(c)(ii) the sum of \$11,050 (gross) minus PAYE, as compensation for lost commission for the 3 month period following

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<sup>8</sup> Schedule 2, clause 11 of the Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under section 87(3) of the [Judicature Act 1908](#). The prescribed rate is currently 5% per annum

dismissal, plus 5% interest on that sum from 28 October 2011 to the date of the Authority's investigation meeting.<sup>9</sup>;

- iii. pursuant to s.123(1)(c)(ii) the sum of \$1,750. (without deduction) as compensation for the loss of a benefit to have personal use of a luxury vehicle during his notice period;
- iv. pursuant to s.123(1)(c)(i) the total sum of \$15,000 (without deduction) as compensation for his various personal grievances.

[90] Pursuant to s.4A, Armstrong Prestige Wellington Limited is to pay \$2,500. as a penalty for breach of good faith, to the Employment Relations Authority which will be paid into the Crown Bank account.

### **Costs**

[91] Costs are reserved.

**Michele Ryan**  
**Member of the Employment Relations Authority**

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<sup>9</sup> Ibid at 8.