

NOTE: An order for the payment of a penalty appears on p 32 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 22/09
5090344

BETWEEN PHILLIP SULUSULU
 Applicant

AND FIRES BY DESIGN LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: C Eggleston, counsel for Applicant
 K McConnell, advocate for Respondent

Investigation Meeting: 13 and 26 May 2008

Additional information provided: 3 and 24 June, 3 and 31 July, 9 and 22 September 2008

Submissions received: 3 and 13 October 2008 from Applicant
 3 and 10 October 2008 from Respondent

Determination: 28 January 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Phillip Sulusulu says he has personal grievances on the ground that his former employer, Fires by Design Limited (“FBDL”) suspended then dismissed him unjustifiably. From FBDL’s point of view both the suspension and the dismissal were justified and arose out of concerns that during his employment Mr Sulusulu was conducting business through a company he owned, being a business offering a service in competition with FBDL. Mr Sulusulu says the real reason for the dismissal was that he had refused to accept a drop in his remuneration.

[2] Mr Sulusulu also seeks an enquiry into sums due to him for commissions and holiday pay, and a penalty under s 130(4) of the Employment Relations Act 2000 for

the failure to supply a copy of his wage and time record. He asks that the penalty be paid to him personally.

[3] FBDL says it does not owe Mr Sulusulu any money by way of commission or holiday pay, and denies failing to supply wage and time records.

[4] The statement in reply also contained broadly stated allegations of breach of restraint of trade and confidentiality provisions in the parties' employment agreement, as well as of a conflict of interest provision. The allegations appeared to concern the activities of a company which Mr Sulusulu incorporated after his dismissal, and were not relevant to the circumstances leading to the dismissal. The statement in reply said enforcement of these terms and conditions was sought. When I enquired during a conference call about the purpose of the allegations, and the reference to enforcement, I was told the allegations, as well as a further allegation of breach of the duty of fidelity, were not intended as a counterclaim. No separate claim in respect of them was before the Authority.

Background

1. Companies associated with Warmington Industries

[5] Warmington Industries (1994) Limited ("WIL") is in the business of designing and manufacturing fireplaces for use in home heating. Up to and including August 2003 its business encompassed wholesale and retail sales, and installing the fireplaces. At the material times it continued with designing, manufacturing and wholesaling activities. Gregory Stevenson is the sole director of WIL, with an investment company as the shareholder.

[6] In January 2002 Mr Sulusulu was employed as a trainee installer in the Fires by Design division of WIL.

[7] FBDL was registered as a separate company on 26 August 2003. Another company, Tech Install Services Limited ("TIS") was also registered on that date. Mr Stevenson was the sole director and shareholder of both companies. The business of TIS was to carry out installation work for WIL and FBDL, and such other installation

business as it could obtain. FBDL did not carry out installation work, rather its focus was on retail sales.

[8] I take this opportunity to address an application to join WIL as a party to this employment relationship problem, which Mr Eggleston made during the investigation meeting. The application was inevitable following Mr Stevenson's assertion during the meeting that FBDL was a shelf company. It prompted a further investigation into whether FBDL was indeed no more than a shelf company, in turn causing part of the delay in determining this employment relationship problem. The resulting information showed that FBDL has been operating as a separate trading entity. For present purposes I am not persuaded WIL should be joined as a party to this problem.

2. Terms and conditions of Mr Sulusulu's employment

[9] On 1 September 2003 Mr Sulusulu and FBDL entered into a written employment agreement. Some written policies were also said to apply. I now summarise or record terms and conditions of employment which are relevant to the various matters currently before the Authority.

A. Mr Sulusulu's position

[10] FBDL employed Mr Sulusulu as a technical sales consultant. The schedule of duties attached to the employment agreement described the role as:

“... operates the retail sales of the show room and also involved with the on site consultation with the home owner, builder, architect and specifiers.”

[11] The role also involved holding a current NZ Home Heating Association (“NZHHA”) Installers Certificate, and included commissioning special projects and the preventative maintenance of existing installations.

[12] There was a long list of responsibilities, including: offering installation solutions to clients; following the system from the sales process to the completion of installation; completing costing of components and the installation of the project on the required sheets; briefing the installer prior to installation; being on call if the

installer had any difficulty; collecting components for dispatch from the factory to the site; and maintenance and upkeep of installation manuals. Under another heading 'Sales Process' were the items: site call and obtain measurement and information for the installation; and collate job sheets for installation.

B. Conflict of interest

[13] Mr Sulusulu's conduct of business through his own company while employed by FBDL was addressed with reference to an alleged conflict of interest. The provision in the employment agreement in respect of conflicts of interest read:

"18. Conflict of interest

The employee shall refer all business contacts and all ideas, inventions and opportunities of which the employee becomes aware and which relate to the business of the company or of its principals and shall not establish himself/herself or engage in private business or undertake other employment in competition with the company or which in any way conflicts with the company's business without the written consent of the company."

C. Use of company email and fax equipment

[14] Mr Sulusulu's conduct of his own business was said to have included the use of company equipment, including email and fax, during company time.

[15] There was more than one written email policy, breach of which was expressed to constitute misconduct or serious misconduct. It was not clear precisely which provision was relied on, but clause 5 in a document headed 'email policy' prohibited the creation, sending or exchanging of email unrelated to the official business of the company and which may bring the company into disrepute. A second document headed 'Warmington Industries 1994 Limited policy on use of company computer system and equipment including email and internet' was considerably more detailed. It also contained reference to the prohibition on the use of the company's computer system for non work-related duties and activities.

[16] If there was a written policy regarding the use of the facsimile it was not produced, unless the second of the documents listed above was intended to apply. A

document described as 'company fax procedure' was no more than someone's typewritten note of the circumstances of the receipt of a particular facsimile message.

D. Commission on sales

[17] There was no provision for commission payments in the September 2003 employment agreement. However an agreement was reached in December 2003 to the effect that Mr Sulusulu's salary would increase, and his rate of commission would increase to 5%.

[18] Although no signed record was produced, it was common ground that a document headed '5% Commission' set out relevant terms. The document provided that commission was payable at 5% on monthly sales in excess of \$40,000. Bonuses would be payable for quarterly sales in excess of \$300,000, and with annual sales in excess of \$1,000,000 attracting a bonus of \$10,000. Sale prices were to be calculated from the standard pricing list, exclusive of GST. To be credited for commission purposes sales were to be signed for by the customer on an 'acceptance form' or on a copy of the customer's written purchase order, prior to month end. Commission was payable on a monthly basis subject to a 40% deposit being received on or before the last day of the month.

[19] Cancelled sales were removed from the sales figures for the next current month. 'Errors of quotations' could be deducted from commissions. A certain level of error was acceptable, but errors in excess of that level would result in the removal of the total sale figure from the next current month's figures over \$40,000. Cancelled sales would have the same outcome.

E. Motor vehicle and fuel card

[20] With reference to Mr Sulusulu's request for remedies in respect of the loss of use of a motor vehicle and fuel card, the employment agreement provided:

"14. Motor Vehicle

- a. Where the employee is provided with a Company vehicle for use on the employer's business, it shall not be available for private use by the employee. [with an exception relating to travel between home and work]

- b. The vehicle shall not be considered part of the employee's remuneration ... If requested to do so the employee must immediately surrender the vehicle to the employer.
- c. ..."

[21] In addition the company had a written motor vehicle policy. It reiterated that vehicles were provided for business use, and added that private use could be obtained only as a result of written permission from the managing director (Mr Stevenson).

[22] The policy also required all fuel and oil costs to be paid for with the vehicle charge card. It provided further that vehicle charge cards were not to be used for private purposes.

3. Mr Sulusulu registers his own company

[23] On 12 April 2005 Mr Sulusulu registered a company named Installation Services Limited ("ISL"). He was the sole director and shareholder. ISL was in the business of installing fireplaces and competed with TIS.

[24] Mr Sulusulu planned to carry out ISL's work during evenings and weekends. He proceeded to carry out this competing work. For the purposes of this employment relationship problem it is not necessary to resolve any dispute about the hours during which he did so.

[25] Mr Stevenson was then unaware of ISL's existence or operation.

4. Mr Sulusulu's roles in TIS and ISL

[26] On or about 3 May 2005 Mr Sulusulu was called to a meeting to discuss ISL. The meeting was prompted by FBDL's receipt of a letter from Mr Sulusulu to a client which was sent on ISL letterhead, dated 25 March 2005, and attached a quote dated 14 April 2005 for the installation of a fireplace. Mr Stevenson informed Mr Sulusulu that his activities amounted to a conflict of interest. In response Mr Sulusulu offered his resignation, effective on that date.

[27] After further discussion the parties agreed Mr Sulusulu's employment would resume. Mr Sulusulu could 'run' TIS with a view to deciding whether to purchase it. In an undated and handwritten note Mr Stevenson recorded that Mr Sulusulu would 'dissolve' ISL. The note also recorded an increase in Mr Sulusulu's salary to \$50,000 pa, and a commission arrangement under which Mr Sulusulu would receive 5% on all sales. That meant the \$40,000 threshold was removed. Finally, the note recorded that Mr Sulusulu was to spend 80% of his time on TIS work and 20% of his time on sales.

[28] On 10 May 2005 Mr Sulusulu signed a 'confidentiality deed' recording that TIS had agreed to make certain confidential information available to him for the purpose of acquiring the business of TIS. Clause 10 of that agreement provided that Mr Sulusulu was the 'preferred purchaser to provide an expression of interest in acquisition for a period of 1 month from 10 May'. There was no suggestion that any expression of interest was subsequently forwarded, or that confidential information of the kind defined in the deed was sought. Indeed there was no evidence that anyone actively pursued Mr Sulusulu's purchase of TIS.

[29] Mr Sulusulu did not accept in evidence that he agreed to 'dissolve' ISL, but said he agreed ISL would not accept further work. There was no evidence that ISL sought or accepted work in the months immediately following May 2005. Otherwise it was not, and is not, clear what Mr Stevenson meant by 'dissolving' TIS. However Mr Stevenson conveyed his dissatisfaction with Mr Sulusulu's operating ISL, Mr Sulusulu at least agreed to cease doing so, and the parties entered into an arrangement in anticipation of Mr Sulusulu's possible purchase of TIS.

[30] Mr Sulusulu did not accept, either, that there was any discussion to the effect that he would spend 80% of his time on TIS work. He may be correct in that the associated discussion was not couched in precisely those terms, but in the above circumstances it would be unusual if there was no consensus to the effect that Mr Sulusulu would concentrate his efforts on TIS. Accordingly, whether or not 80% or any other proportion was discussed, I consider it likely there was a consensus that Mr Sulusulu would concentrate his efforts on TIS rather than on selling for FBDL.

5. TIS ceases to trade

[31] TIS did not trade successfully. It is not necessary to address the reasons for this, although his own evidence suggests Mr Sulusulu devoted much of his time to selling for FBDL rather than to 'running' TIS.

[32] In early September 2005 there was a 'senior management' meeting during which the fate of TIS was discussed. The office manager, Ann Lereculey attended the meeting, but Mr Sulusulu did not.

[33] According to a handwritten note outlining the discussion at the meeting, and dated 4 September 2005, on or about that date Mr Stevenson decided 'TIS will be 'closing down' from the 21st October 2005'.

[34] The employment of the three TIS installers was terminated in October and November 2005.

6. Arrangements for 'preferred' and 'approved' installers

[35] The 4 September note also recorded that installation work was to be contracted out to 'approved FBDL and WIL installers only!!!'. In a subsequent page Mr Stevenson noted again: 'Only approved FBD//or Warmington installers are to be recommended. BECAUSE 1. Liability. The (legal) liability that is FBD. Due to offering the person or persons – verbal is liability also.' I understood the reference to liability as a reference to the companies' liabilities under the warranties on Warmington-manufactured fires.

[36] Mr Stevenson said in evidence that he communicated both to those at the meeting and to the installers that he required installation work to be referred to certified installers only. A 'certified installer' was someone who had obtained an NZHHA installer's certificate following completion of the necessary courses. Mr Sulusulu had begun the relevant training, but had not qualified as a certified installer. Instead he had qualified as an accredited technician and was certified as such.

[37] On Mr Stevenson's instruction Ms Lereculey subsequently made approaches to the NZHHA seeking names of suitably qualified installers. The NZHHA website now contains that information, but as I understand it that was not the case at the relevant time. Mr Stevenson intended to interview the installers thus identified and

decide whether they were suitable to become WIL's or FBDL's installers. There were discussions of a kind with some of these people, but no formal or consistent arrangement was entered into.

[38] After TIS ceased accepting new business, customers seeking installation services were to be referred to 'Josh' or 'Bryce'. Josh Heineke operated a fireplace installation business, and employed one of TIS' former installers, Harry Redgrove. Mr Stevenson promised to make installation work available to Mr Heineke's company. Bryce Thompson was also a former TIS installer, and Mr Stevenson also promised work to him. Mr Thompson had not completed the necessary certification, but Mr Stevenson took responsibility for Mr Thompson's installations until the certification was obtained. He did not do so for Mr Sulusulu.

[39] Mr Stevenson said these people, as well as a third person not formerly associated with TIS, remain the only installers to whom installation work is referred.

[40] Mr Sulusulu's evidence about the extent of his knowledge of any arrangement regarding at least 'approved' or 'preferred' installers was inconsistent. I find he must at least have known of Ms Lereculey's approaches to the NZHHA and had some understanding of why they were being made. He was also aware that Messrs Thompson and Heineke were receiving installation work from FBDL, although the evidence did not go as far as establishing he was aware of any promise of preferential treatment Mr Stevenson had made to either of those people.

[41] At the same time, Mr Stevenson's interchangeable use of the terms 'certified', 'approved' and 'preferred' installers when giving evidence did not assist. He made matters worse by adding the notion of certain installers having 'first refusal' on work from FBDL.

[42] Otherwise TIS' work in progress was completed, as was remedial work carried out under warranty, before the company ceased all activities. The last of the work was completed in June 2006.

7. ISL resumes trading

[43] When it came to Mr Sulusulu's attention that TIS had ceased trading he sought legal advice about whether ISL could resume trading. He said the advice was that, since neither FBDL nor TIS was in the business of installing fireplaces, there would not be a conflict of interest. I cannot comment on how fully and accurately he briefed his advisor, or whether he applied or conveyed accurately the advice he received.

[44] Mr Sulusulu said further that he approached Ms Lereculey about the prospect of resuming ISL's activities. He informed her of the advice he had received. Ms Lereculey gave him permission to resume trading.

[45] Ms Lereculey said in evidence that she was responsible for the day to day running of the company, including supervising Mr Sulusulu. Although Mr Sulusulu's employment agreement recorded that he reported to the sales manager, it appears that FBDL treated Ms Lereculey as the sales manager for the purposes of the employment relationship. This was so much so that, in a letter dated 30 January 2007, Mr McConnell advised that Ms Lereculey was to be issued with a final written warning for her failure to manage 'one of her staff'. The alleged failure to manage concerned her role in permitting Mr Sulusulu to pursue his own business activities.

[46] The evidence about exactly when ISL resumed trading was not clear, but the resumption occurred no later than November 2005. Again, at the time Mr Stevenson was unaware of ISL's activities.

8. Attempt to alter Mr Sulusulu's remuneration

[47] In November 2006 Mr Sulusulu was called into a meeting about his commission payments. Mr Stevenson wanted him to sign a new agreement returning to the previous commission arrangement. Mr Sulusulu said he was told to sign the new agreement or move on as his job no longer existed.

[48] Mr Stevenson said he called the meeting because Mr Sulusulu's commission arrangement was intended to recognise that he would be focussing on managing TIS, presumably at the expense of his commission sales income. Since Mr Sulusulu was no longer managing TIS it was appropriate to review his base salary and commission, and realign it with the rest of the staff.

[49] Each party accused the other of having an angry and negative approach during the discussion.

[50] These were the circumstances of the refusal to accept a drop in remuneration which Mr Sulusulu says was the real reason for his dismissal.

[51] Mr Stevenson's account is consistent with his intentions of the previous year regarding the future of TIS, as well as Mr Sulusulu's intended involvement in TIS. However those intentions had not been put into effect, and Mr Stevenson had left it far too late to address the matter as it affected Mr Sulusulu's terms and conditions of employment. I consider it likely that both parties became angry during the discussion. However I do not accept that Mr Sulusulu's resistance to signing a new agreement was the real reason for his dismissal. The real reasons were concerned with the resumption of ISL's activities.

The suspension

1. Actions leading to the decision to suspend

[52] A facsimile message to ISL from a company trading as Lonestar Construction was received on the WIL fax on 18 December 2006. The message referred to receipt of a quote in July 2006, and a subsequent invoicing problem. It attached a copy of the invoice in question, which was sent by ISL on the WIL fax and was dated 14 December 2006. The work in question was the fitting of a custom designed 3 metre gas firebox. This material was the first indication to Mr Stevenson that ISL had resumed trading. On 19 December 2006 Mr Stevenson sought a meeting with Mr Sulusulu in order to discuss an alleged conflict of interest.

[53] Mr Sulusulu's solicitor was not available to attend a meeting until the New Year. Mr Sulusulu declined to meet until his solicitor was available.

[54] Mr Stevenson also sought to meet with Ms Lereculey about her involvement. Although her solicitor was not available, she was prevailed upon to provide some form of response anyway. There was to be a discussion on 21 December 2006. Ms Lereculey asked Mr Sulusulu to attend as her witness.

[55] At the discussion Mr Stevenson simply informed both Ms Lereculey and Mr Sulusulu that they were suspended until a meeting could be arranged. He said in evidence he did so in order to ‘protect the business’ and ‘take the heat out of the situation’. He alleged further that Mr Sulusulu deleted ‘incoming’ and ‘deleted’ email messages from his work computer at or about that time, but beyond the assertion to this effect there was no evidence in support.

[56] Both Mr Sulusulu and Ms Lereculey were told they were suspended on pay.

[57] Mr Sulusulu says he had already arranged to be on holiday until 19 January 2007, so the suspension did not achieve anything. He did, however, lose the use of a company vehicle and fuel card over the holiday period. He also says the suspension ‘payment’ was treated as annual leave when it should not have been, and FBDL has refused to pay the holiday pay he is owed as a result.

2. Whether the suspension was justified

[58] I take the following approach to determining whether the suspension was unjustified and Mr Sulusulu has a personal grievance as a result.

“[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of an employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from **Tawhiwhirangi** ... confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.”¹

[59] A further decision of the Employment Court addressed the relevance of the lack of any contractual provision for suspension, which was also the case here.

¹ **Graham v Airways Corporation of New Zealand** [2005] ERNZ 587, 613

[60] The court said:

“In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct or even serious misconduct does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee’s continued presence in the workplace will or may give rise to some other significant issue.”²

[61] The passage applies both to paid and unpaid suspensions.

[62] The potentially ‘significant issue’ amounted here to the alleged need to ‘protect the business’. I do not accept that suspension was justified in order to ‘take the heat out of the situation’.

[63] Further to the need to ‘protect the business’, Mr Stevenson had available information indicating Mr Sulusulu had resumed the operation of a business which had in the past competed with FBDL’s associate, TIS. Mr Stevenson had no information about the current extent of the resumption or when it began. Mr Stevenson still viewed ISL as a competitor. Finally, it appeared Mr Sulusulu was communicating with his own clients while at work for FBDL, although again the extent of that was uncertain. There was sufficient to pose a threat to the FBDL business, which Mr Stevenson was in principle entitled to protect by removing Mr Sulusulu from the business pending a resolution.

[64] In practice, however, the Christmas break was imminent and Mr Sulusulu was to be absent on annual leave. While it was reasonable for FBDL to seek to take protective steps, the intervention of a period of annual leave considerably lessens the need to invoke suspension as a protective measure. There is no reason why other protective steps short of suspension could not have been taken.

[65] That matter, together with the imposition of the suspension when there was no contractual provision for suspension and the failure to give Mr Sulusulu an

² **Singh v Sherildee Holdings Limited t/a New World Opotiki** (Judge Couch, 22 September 2005, AC 53/05)

opportunity to be heard on the imposition of a suspension, lead me to find the suspension was unjustified.

3. Remedies

[66] Mr Sulusulu seeks payment in respect of lost remuneration in the equivalent of the annual leave attributed to the period of his suspension, or alternatively the reinstatement of the annual leave. He also seeks compensation for his loss of use of a company vehicle and fuel card, and for injury to his feelings.

[67] The unjustified suspension has not caused any actual loss of remuneration in the period in which Mr Sulusulu was on leave. Instead what was said to be a suspension was treated as annual leave. In reality Mr Sulusulu seeks the reinstatement of the annual leave in question. I address that issue in this section of the determination, although a separate claim for the payment of monies was also made in respect of it.

[68] A disciplinary suspension does not suspend the entirety of the parties' rights and obligations under an employment agreement – it affects the rights and obligations in respect of the offer and performance of work, and payment for work. A disciplinary suspension could not also suspend the exercise of an entitlement to annual leave already arranged. I observe further that - although in the course of a decision regarding the suspension of non-striking workers under earlier legislation - the Arbitration Court did not believe annual leave could be reinstated for employees who had taken annual leave during the relevant suspension.³

[69] Regarding the loss of use of the company vehicle and fuel card, the express terms of the employment agreement are clear on the extent of the entitlement to use of a vehicle. If the vehicle was available only for business use and travel to and from home, then Mr Sulusulu suffered no loss. However he and Ms Lereculey say that in practice full personal use was enjoyed. Even Mr Stevenson said personal use was condoned up to a point.

³ **NZ Engineering, Coachbuilding, Aircraft, Motor etc IUOW v Firestone Tire & Rubber Co of NZ Ltd** [1986] ACJ 801

[70] Even so I would not accept that full and unrestricted personal use was permitted. For example the motor vehicle policy contained restrictions on the use of a vehicle outside the Auckland area, and it appears that at least an attempt was made to enforce that restriction.

[71] Mr Sulusulu estimated that the value of the vehicle on an annual basis was \$15,000. The estimate incorporates an assumption that the provision of a vehicle was in reality part of Mr Sulusulu's remuneration package and he was entitled to full personal use. On that basis the equivalent value for the 4.5 week period of his suspension is \$1,300. Although no foundation for Mr Sulusulu's estimate was provided, nor did FBDL suggest a more accurate figure.

[72] Mr Sulusulu is entitled to some consideration of the fact that private use was condoned, but not to the point that full private use was permitted. I therefore assess the overall loss in respect of both the vehicle and the fuel card at \$1,000. I do not believe Mr Sulusulu's conduct contributed in a blameworthy way to the lack of justification for the suspension, with reference to the reasons for the lack of justification, and make no further reduction.

[73] FBDL is ordered to reimburse Mr Sulusulu accordingly.

[74] There was minimal evidence of any injury to feelings caused by the unjustified suspension, and in the circumstances I do not consider an order in that respect is warranted.

The dismissal

1. Actions leading to the decision to dismiss

[75] By further letter dated 9 January 2007, FBDL asked Mr Sulusulu to explain several matters including why he:

- a. was operating ISL in direct competition to a service offered by his employer;
- b. was using his employer's resources to operate that business;

- c. had provided installation services to 'Mel Harpur' for 'Bob Paton' and 'Barry Plumpton' in direct competition with the installation services provided by FBDL through its preferred installers, being also the installation of fireplaces Mr Sulusulu had sold as an employee of FBDL;
- d. received the fax from Lonestar; and
- e. sent an ISL fax on WIL's equipment.

[76] Mr Sulusulu was also said to have commented to Mr Stevenson (in reference to a discussion on 19 December about ISL's activities) that: "I told my manager [Ms Lereculey] and because we knew you were unsympathetic to it [trading through ISL] we didn't tell you". The letter asked Mr Sulusulu to explain the comment.

[77] A disciplinary meeting went ahead on the afternoon of 17 January 2007. Mr Sulusulu attended with his solicitor. That morning, FBDL had provided the solicitor with copies of: its policies on the use of cellular phones, email, the company's computers, and motor vehicles; Mr Sulusulu's employment agreement; the Lonestar Construction fax, as well as other ISL invoices or quotes obtained from Mr Sulusulu's computer at the time; and a list of four FBDL customers who either approached Mr Stevenson or were approached by him about Mr Sulusulu's activities.

[78] During the meeting there was a discussion about whether ISL was competing with FBDL (being Mr Sulusulu's employer) and about whether FBDL had 'preferred' suppliers. Mr Stevenson also raised his concern about liability under warranties.

[79] For his part Mr Sulusulu did not deny that ISL was carrying out installation work, but said the service was not in competition with FBDL or TIS as the former did not carry out installation work and the latter had ceased doing so.

[80] Mr Sulusulu did not deny using the WIL/FBDL fax, but said his use was blown out of all proportion. He said staff frequently used the fax for personal or other business. If there were written policies on the matter Mr Sulusulu had not been aware of them, and they were not policed.

[81] Mr Sulusulu also told Mr Stevenson he was unaware there was a 'preferred installer' arrangement. He pointed out that another employee, Richard Hayes, had been permitted to carry out installation work of his own.

[82] Mr Sulusulu denied making the comment attributed to him regarding Mr Stevenson's likely 'unsympathetic' response to his resumed activities at ISL.

[83] The meeting ended on the basis that Mr Sulusulu's solicitor would make enquiries about Mr Sulusulu's use of FBDL's time, and FBDL would write formally seeking further information.

[84] It did so by letter dated 18 January, seeking details of work done by ISL since April 2005. The response came in a letter from Mr Sulusulu's solicitor dated 22 January 2007, saying Mr Sulusulu was not obliged to provide the information.

[85] The letter went on to repeat Mr Sulusulu's view that his company was not in competition with FBDL and to deny that there was any arrangement regarding 'approved' or 'preferred' installers. It pointed out further that Mr Sulusulu had been told not to recommend installers, and that FBDL's terms of trade referred variously to installation being at the customer's discretion and that additional components and installation were the responsibility of the client.

[86] I record that standard terms and conditions of sale provided for installation as follows:

"Installation must be to manufacturers specifications. Trades persons contracted to install appliance at 'The Customers' discretion. All fireplaces to be installed to New Zealand Standards or 'Warmington' specifications where applicable. A registered installer will provide a 'Producer Statement' as certification of correct installation (Council requirement). ..."

[87] The letter went on to say that ISL's activities had resumed after TIS ceased to trade, and had the approval of Ms Lereculey. It raised Mr Hayes' installation work, and said the dismissal of Mr Sulusulu would amount to disparity of treatment. It denied any more than minimal use of company resources and said Mr Sulusulu had no recollection of seeing the policies that were sent to his solicitor. It finished by

referring to Mr Sulusulu's service, and raising a concern that the real reason for seeking to dismiss was Mr Sulusulu's refusal to agree to an amended employment agreement.

[88] Mr Stevenson did not accept this. There was no evidence of any further discussion. In a letter of dismissal dated 23 January 2007 Mr Stevenson said:

- a. FBDL had never ceased operating an installation service in that, pursuant to a verbal agreement, Bryce Thompson and Josh Heineke should be given first option on any installation work;
- b. Mr Hayes had sought and was granted permission to do the work in question some four years earlier, and the work was approved by Mr Stevenson first;
- c. Mr Sulusulu had provided quotes for ISL while still employed by FBDL;
- d. Mr Sulusulu had used FBDL's phone, fax and email for the purposes of ISL, and while reasonable personal use was not of concern the use of company resources to promote the commercial transactions of an unassociated enterprise was unauthorised and unacceptable;
- e. Mr Sulusulu had reneged on an agreement to 'dissolve' ISL; and
- f. FBDL was not motivated by Mr Sulusulu's response to the request that he sign a new employment agreement.

[89] Accordingly Mr Sulusulu was dismissed with immediate effect.

[90] Mr Sulusulu's personal grievance was raised promptly in a letter dated 25 January 2007, to which I return later as it also raised other matters. The letter included a request for the reasons for the dismissal.

[91] Mr Stevenson responded by letter dated 1 February 2007, referring to the reasons in the 23 January letter but also saying the reasons were:

- a. conflict of interests;
- b. performing work for another organisation while in the paid employment of FBDL; and

- c. using his employer's equipment to send and receive electronic and fax communications relating to ISL during working hours.

[92] In what I take as a reference to Mr Sulusulu's solicitor's letter of 22 January 2007, the 1 February letter stated that Mr Sulusulu's refusal to provide information about ISL's installations and quotes pending from 12 April 2005 – 22 December 2006 was a contributing factor.

2. Whether the dismissal was justified

[93] In determining the justification for the dismissal, I must focus on the reasons that were operative at the time. These are identified primarily with reference to the reasons given in the correspondence at the time. Thus, while numerous allegations were made during the Authority's investigation about Mr Sulusulu's conduct and actions both during his employment and after its termination, those matters did not constitute operative reasons for the dismissal and cannot be invoked to justify the dismissal. Breach of the duty of fidelity, for example, was not given as a reason for the dismissal.

[94] I record for completeness that a number of new requests and allegations were raised in FBDL's submissions in reply. It was not appropriate to raise new matters in that way, and the matters were too extensive to warrant an attempt to address them nevertheless. Further, the nature of the contended connection (if any) of some of them with the circumstances of the dismissal was not clear.

[95] I now return to the reasons given for the dismissal

A. Conflict of interest

[96] Clause 18 of the employment agreement defines Mr Sulusulu's obligations to FBDL in relation to any conflict of interest. Of particular relevance are the passages preventing Mr Sulusulu from engaging in private business in competition with the company, or in a way that conflicts with the company's business.

[97] The 23 January dismissal letter, read together with the 9 January letter requesting explanations, identifies the conflict of interest as resting on the view that ISL was operating in direct competition with a service provided by FBDL. Nothing to any other effect was indicated in the submissions for FBDL, which merely asserted there was a failure to comply with clause 18.

[98] The service in question was the installation service said to be provided as a result of the referral arrangements with Messrs Thompson and Heineke. I have assumed from the questions put to Mr Sulusulu in the 9 January letter that examples were embodied in an invoice dated 10 April 2006 from ISL to a Barry Plumpton, and a quote from ISL to a Bob Paton dated 28 June 2006. The issue was also the basis for the queries in the communication on the morning of 17 January regarding Mr Sulusulu's contacts with four other FBDL customers.

[99] There was no suggestion that the installations indicated by those examples should have been regarded as TIS' work in progress or remedial work, rather than new installation work. Accordingly I have assumed the latter is the case.

[100] On the evidence I do not accept that any arrangement Mr Stevenson may have reached with other installers amounted to a 'service' provided by FBDL. Beyond assertions of the kind set out in this determination, there has been no explanation or argument addressing why these arrangements are correctly described as a 'service' offered by FBDL. There was no evidence of any commercial arrangement between it and the installers concerned, namely Josh and Bryce. Instead the arrangements in place were informal, and involved an element of the doing of a favour for the individuals concerned.

[101] Beyond that, the evidence was confused. Mr Stevenson did say that FBDL sought to exercise a degree of control over who installed its fires in order to protect itself from liability under its warranties. However his interchangeable use of terminology, and the personal nature of some of the arrangements he reached with particular installers, did little to shed light on who was to be treated as an 'approved', 'certified' 'preferred' or other installer and in turn what if any instruction Mr Sulusulu might have failed to observe in that respect.

[102] In any event, I would not accept anything in the arrangements amounted on the face of the matter to the provision of a service by FBDL.

[103] I do not therefore regard Mr Sulusulu's installation service as being in competition with a service offered by FBDL. This conclusion is not affected by the late submission that FBDL may retain the capacity to offer installation services itself (through Mr Stevenson) if it wishes.

[104] Other concerns were expressed about aspects of the way Mr Sulusulu offered his own installation service through ISL. There was discussion in evidence, for example, about: the fact that Mr Sulusulu had not qualified in his own right as a certified installer, but only as an accredited technician; the extent to which he made it clear to customers that he was operating his own service independently of any service apparently being offered by FBDL; the extent to which he obtained installation work for ISL in association with his sales activities on behalf of FBDL; his use of an NZHHA installer number identified with WIL when carrying out ISL work; and his signing off producer statements for ISL installations in these circumstances.

[105] In relation to the overlap between Mr Sulusulu's activities on behalf of FBDL, and those on behalf of ISL, Mr Stevenson had asked Mr Sulusulu to respond to concerns that he had sold fires on behalf of FBDL and installed them through ISL. For example Mr Sulusulu provided a quote for an installation on behalf of ISL to a client named Wilson. He followed a similar process with clients named Power. He also invoiced the client named Plumpton for the installation of a fire by ISL, sending the invoice by fax with a covering sheet on FBDL letterhead.

[106] However nothing in the evidence before the Authority indicated the associated issues were pursued in any detail at the time, and nothing arising directly out of the transactions was cited as a reason for the dismissal. As I have found, the mere fact Mr Sulusulu offered installation services to these people did not amount to offering a service in competition with FBDL or in that sense to a conflict of interest. No other aspect of clause 18 of the employment agreement was relied on. If anything else in the conduct was considered a ground for dismissal it should have been investigated and expressly cited as a reason for dismissal.

B. Working for someone else during company time

[107] The provision of quotes on behalf of ISL during FBDL's time amounted to 'performing work for another organisation during company time'. Otherwise the evidence about the extent to which Mr Sulusulu was carrying out ISL work in FBDL's time was very limited and it is impossible to assess its extent.

[108] In addition, in evidence Mr Stevenson acknowledged some tolerance for the conduct of other business, not being personal business, during FBDL's time. In Mr Sulusulu's case, Mr Stevenson believed that the work competed with FBDL's and the activities were unacceptable on that ground.

C. Use of company equipment

[109] The use of company resources was acknowledged as amounting to a concern about the use of the equipment for the purposes of ISL, rather than a concern about the mere use of equipment for non work-related activities. Again, Mr Stevenson admitted to some tolerance for the latter.

D. Additional reasons

[110] To the extent that the dismissal relied on an allegation that Mr Sulusulu reneged on an agreement to 'dissolve' ISL, I have commented that the meaning of 'dissolve' is not clear in that context. It appears from the limited information before the Authority that ISL did cease trading for a period, so to that extent there was no 'renegging'. The circumstances in which trading resumed, and Mr Sulusulu's conduct in that respect, are discussed elsewhere.

[111] As for the other allegations were made about Mr Sulusulu's conduct during the Authority's investigation, I repeat that when determining the justification for a dismissal - and in the absence of a finding that they were not the genuine reasons - the reasons given by the employer at the time of dismissal must be the focus. Although I have reservations about whether the reasons were explained and expressed felicitously in the context of Mr Sulusulu's obligations to his employer, the extent of

the employer's investigation at the time meant it was not necessary or appropriate to take that matter any further.

3. Conclusion

[112] I do not accept that FBDL was offering an installation service, so that I find ISL's installation service was not a competing service. I do not accept that a fair and reasonable employer would be justified in saying ISL's was a competing service, or in dismissing Mr Sulusulu on that ground.

[113] While Mr Sulusulu should not have used company time and equipment for ISL-related activities in the way he did, as grounds for dismissal this use of time and equipment was linked with the view that ISL was offering a competing service. If that view was wrong, and there was otherwise a level of tolerance even for personal business-related activities, then there is not enough in these grounds to justify a dismissal in themselves.

[114] For these reasons I conclude that dismissal was not the action a fair and reasonable employer would have taken, and the dismissal was unjustified.

3. Remedies

A. Quantifying remuneration lost

[115] Mr Sulusulu seeks the reimbursement of remuneration lost as a result of his personal grievance. He said that in the 8 months prior to his dismissal he had earned \$80,000. He expected to earn \$120,000 for the full year, plus a bonus of \$10,000. He said his total package had a value of \$145,000 pa if it included his estimate of the value of his use of a company vehicle. In submissions, the package was treated as \$135,000 pa and the bonus was commented on separately.

[116] On 13 February 2007 a company named Fireplace Professionals Limited ("FPL") was registered. The company is in the business of designing and installing fireplaces, and was the business referred to in FBDL's statement in reply. Mr

Sulusulu and Ms Lereculey are the directors and shareholders. In calculating his lost remuneration, Mr Sulusulu deducted income received from FPL.

[117] Mr Sulusulu's loss was calculated in submissions as:

- . [3 x \$135,000/12] - \$5,200 (from FPL) = \$28,550 for the first three months after dismissal; plus
- . 25 weeks' remuneration at the difference between earnings under the FBDL package and earnings from FPL, taking into account gaining of access to a vehicle, being \$31,540.48; plus
- . a further 14 weeks' lost remuneration, less the allowance for a vehicle and less earnings from FPL, being \$17,809.90.

[118] Regarding the value of Mr Sulusulu's package, the year to date gross earnings figure in a payroll record dated 21 December 2006 was \$84,922.53. The year to date hours were 1664. Wages were paid fortnightly on the basis of an 80 hour fortnight. Accordingly the year to date total covered 20.8 fortnights. The average payment per fortnight was \$4,082.81, or \$2,041.40 per week. I adopt that figure.

[119] I have commented on the value of the vehicle, and awarded approximately 75% of the loss claimed for the reasons given. Applying that reduction here, the annualised value of the vehicle is $.75 \times \$15,000 = \$11,250$, or \$216.35 per week. I adopt that figure.

[120] Further to the claim in respect of the bonus, Mr Sulusulu says he was denied the opportunity of achieving his goal of reaching \$1,000,000 in sales for the year, despite being on target to do so. Bearing in mind that there were four months to go before the end of the applicable year, the loss of the chance to earn the bonus was valued at 66%, or \$6,600. That amount was also sought.

[121] Commission and bonus payments were payable on the basis of a year commencing 1 April. Regarding the bonus which Mr Sulusulu seeks, a document was produced showing that his actual sales figures for the year 1 April 2006 – 31 December 2006 were \$704,580.87. The average of his sales in each of the months of January, February and March for 2004, 2005 and 2006 was added to this, giving a

total of \$843,754.97. In the absence of any evidence to different effect, I am not persuaded that Mr Sulusulu was on track to reach sales of \$1,000,000 for the year April 2006 – March 2007. I decline to make an award in respect of the bonus.

B. Contributory conduct

[122] In setting remedies I must consider the extent to which Mr Sulusulu contributed towards the situation that gave rise to his personal grievance, and, if his actions so require, reduce the remedies that would otherwise have been awarded.⁴

[123] Although I have found that FBDL was not offering an installation service, and ISL was therefore not offering a service in competition with it, there is room for concern about wider aspects of the nature and quality of Mr Sulusulu's actions.

[124] Regarding the purported authorisation by Ms Lereculey of Mr Sulusulu's resumption of trading, both she and Mr Sulusulu were present at the May 2005 meeting at which ISL's activities were addressed, and Mr Stevenson made his views clear. His views at that time were justified. The resumption of ISL's activities was obviously a matter that warranted discussion at least, and the resumption should have been brought to Mr Stevenson's attention. I do not accept that Mr Sulusulu's mere obtaining of legal advice meant he did not need to speak to Mr Stevenson or that he was entitled to purport to rely on the advice without more in the way he did.

[125] Next, I do not accept Mr Sulusulu's denial that he told Mr Stevenson he approached Ms Lereculey about the resumption of ISL's trading because he knew Mr Stevenson would be unhappy about it. Mr Stevenson was certainly in a position not to accept the denial either. It is not possible to say what the content or outcome of a discussion with Mr Stevenson would have been, but in the circumstances of this case the opportunity for discussion should have been offered. Moreover, that Mr Sulusulu sought to bypass Mr Stevenson's authority as he did does not reflect well on him, and its deliberate nature in the light of the background just set out is not an act of good faith.

⁴ s 124 Employment Relations Act

[126] Finally, Mr Sulusulu was offering ISL's installation services without making it clear that he was doing so entirely independently of FBDL. He did not appear to appreciate the implications of that for FBDL and WIL, and he took an unduly narrow view of his own obligations to FBDL.

[127] I therefore conclude that Mr Sulusulu was guilty of blameworthy contributory conduct, and that there was a causal connection between this conduct and the circumstances of his dismissal. There should be a reduction in the remedies awarded to him.

[128] I assess the reduction at 60%.

C. Conclusion in respect of lost remuneration

[129] Section 128 of the Employment Relations Act applies when the Authority has determined that an employee has a personal grievance and has lost remuneration as a result of it. If that is the case, the section obliges the Authority to order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[130] It is not unusual for a dismissed employee who promptly establishes his or her own business to suffer a comparative drop in remuneration during the start-up phase of the business. A task for the Authority is to assess the point at which any continuing loss is caused by the circumstances of the new business rather than the personal grievance, or otherwise amounts to a failure to mitigate loss. In the absence of anything to indicate any other appropriate point, I take three months' lost remuneration as an appropriate starting point and do not exercise the discretion to consider a greater amount. In the absence of any argument to the contrary, I treat 'ordinary time remuneration' as incorporating Mr Sulusulu's salary plus commission.

[131] The starting point is therefore $[13 \times (\$2,041.40 + \$216.35)] - \$5,200$ (from FPL) = \$24,150.75.

[132] Applying the reduction of 60%, the calculation is $.4 \times \$24,150.75 = \$9,660.30$. FBDL is ordered to reimburse Mr Sulusulu in that amount.

D. Compensation for injury to feelings

[133] Mr Sulusulu said the dismissal was not unexpected because of the attitude Mr Stevenson had demonstrated in recent months. It did appear there had been a deterioration in the relationships Mr Stevenson had with Mr Sulusulu and Ms Lereculey respectively. The cause was not clear, and the matter did not affect my conclusion regarding the real reason for the dismissal. Otherwise Mr Sulusulu says he is a proud person who found it humiliating to tell family and friends that he had been dismissed. He also felt he had worked hard and diligently for FBDL, making the dismissal even more stressful and humiliating.

[134] To that I would add that Mr Sulusulu is also an ambitious person who has worked hard to maximise the income opportunities available to him. This observation is not intended as a criticism, although I believe those characteristics led him to overreach when ISL first began trading and to do so again when trading resumed.

[135] Overall the evidence in support of the claim for compensation for injury to feelings was limited. It supported an award which I would have set at \$7,500. Applying the deduction in respect of contributory fault leaves \$3,000. FBDL is ordered to compensate Mr Sulusulu for injury to his feelings in that amount.

Holiday pay

[136] Wage and time records were sought in the letter dated 25 January 2007, but were not provided until shortly before the commencement of the investigation meeting in the Authority. The issues identified on receipt of the records were:

- (a) whether Mr Sulusulu's holiday pay had been calculated correctly; and
- (b) whether Mr Sulusulu should be reimbursed for the annual leave which was applied to the period of his suspension.

1. Calculation of holiday pay

[137] The conclusion of this investigation was delayed for some time while the records were made available and the parties attempted to resolve related matters

outstanding. During that process FBDL has accepted Mr Sulusulu was underpaid holiday pay in the sum of \$1,275.02 (gross). It is ordered to make that payment, if it has not already done so.

[138] I was asked to find that the underpayment was deliberate. It occurred because commission payments were not taken into account in calculating the amount owed, when they should have been. Mr Stevenson's wife, Amber Stevenson, was said to have instructed Ms Lereculey to make a manual amendment to payroll software which otherwise incorporated commission payments in the holiday pay calculation. Ms Lereculey said she made that change. Mrs Stevenson said she had no recollection of the matter, and denied that manual changes were possible.

[139] This matter was first raised during the investigation meeting, and no remedy was sought in respect of it. Further, the evidence amounted to Ms Lereculey's word against Mrs Stevenson's. I can take the matter no further.

2. Reimbursement of leave applied to the period of suspension

[140] I have addressed this matter in the context of the remedies available to Mr Sulusulu as a result of the personal grievance relating to the suspension. No order was made.

Commission payments

1. The framing of the problem before the Authority

[141] Mr Sulusulu's request of the Authority was for an inquiry into the sums payable by way of commission. FBDL asserted in reply that some of Mr Sulusulu's commissions were overstated and that he had not qualified for any commission 'on the mantel sale because Mr Stevenson was responsible for that sale'. Otherwise there was no counterclaim and no request for any remedy in respect of any commission overpaid to Mr Sulusulu

[142] The 'mantel sale' was to a body trading as Mantel Quality Wood and Gas Fires, and referred to as 'Mantel'. Whether Mr Sulusulu was entitled to the commission he received in association with that sale appeared to be the principal issue between the parties. Although some relevant documents had been filed, the documentation was not complete. Accordingly this was another of the matters the parties were to address after the investigation meeting, and resolve if possible, once further relevant documentation was made available.

[143] The parties subsequently advised that they were unable to resolve the matter.

2. The history of the Mantel sale

[144] Mantel sent a fax to WIL on 5 May 2006 requesting information about a customised fire to be made for a client's restaurant, and attaching a rough sketch. Mr Stevenson asked Mr Sulusulu to prepare an urgent proposal in reply, which Mr Sulusulu did on behalf of FBDL in a document dated 11 May 2006. His proposal included customised components, in particular in the form of a custom designed hood system. The proposal was given a quote number 2362, and a price of \$8,790.

[145] On or about 13 June 2006 Mantel faxed a purchase order to WIL, referring to the quote number of Mr Sulusulu's proposal. The order itself was dated 7 June 2006. On the material I have it comprised a single page, was not signed, and had the handwritten annotation 'as per JIQ #2362.'

[146] Mr Eggleston says this constituted the acceptance necessary in terms of the commission structure. Indeed the arrangement was treated as a qualifying sale for Mr Sulusulu, and Ms Lereculey added the sum of \$8,790 (less GST) to his sales figures for commission purposes. Ms Lereculey says that Mrs Stevenson authorised that action.

[147] However the circumstances of the sale did not end with the faxing of the purchase order on 13 June. It was common ground that the Mantel representative had a discussion with Mr Stevenson. Mr Sulusulu believes the approach was made because Mantel realised it had purchased from WIL's retailer (FBDL) rather than from the wholesaler (WIL). Whatever the circumstances, Mantel then prepared a

proposal of its own in a document dated 19 June 2006. The proposal did not include the customised elements contained in Mr Sulusulu's proposal, and the price was reduced to \$5,193.80. Mr Stevenson dealt with that sale.

[148] According to a printout headed 'Warmington' the electronic record contained a revised quote in the sum of \$5,193.80, and given the number 2528, which was accepted on 19 June 2006. The record was part of a 'Cyber Office' quoting system. No other record of the acceptance was available. An invoice to Mantel for \$3,623.98, and dated 29 June 2006, was prepared under the reference number 2528.

3. The Authority's approach to resolving the matter

[149] As matters stand, Mr Sulusulu retains the full commission payment he received at the relevant time. He makes no claim in respect of the matter. There remains no properly identified or quantified counterclaim before the Authority in respect of the recovery from Mr Sulusulu of overpaid commissions. There is, of course, an acknowledged issue between the parties about whether the Mantel sale was a qualifying sale.

[150] I believe there is sufficient in the bare outline of facts set out above to make an assessment of whether the Mantel sale qualified if assessed solely against the criteria set out in the commission document.

[151] However additional allegations such as Mr Sulusulu's to the effect that the fire eventually manufactured for Mantel was the same as the one he had quoted - not to mention the mutual accusations of bad faith - mean there may be more to this dispute than was apparent from the statements of problem and in reply, and from the parties' written statements of evidence. Moreover the dispute about the Mantel sale is evolving beyond the scope indicated when the present investigation began. I have concluded that embarking on a further investigation into the dispute as it is now unfolding would create further undesirable delay in the issue of this determination.

[152] Accordingly I address the matter by making a finding about whether the sale was a qualifying sale with reference to the written commission structure.

[153] With reference to clause 3 of the commission document, there was no evidence that a 40% deposit in respect of Mr Sulusulu's proposal was ever received.

[154] With reference to clause 5 of the document, there was no evidence that Mantel had signed an acceptance form or a purchase order and no evidence of any agreement by a director to any other arrangement.

[155] To the extent that Mrs Stevenson was said to have authorised Ms Lereculey to include the sale in Mr Sulusulu's figures, Mrs Stevenson is not (and nor was she at the time) registered on the companies office record as a director of FBDL. If her authority is relied on in a more general way then I note that Mrs Stevenson denied giving it. That leaves me able to say only that I am not persuaded that any such authority was given.

[156] With reference to clause 9, in that Mr Sulusulu's sale did not proceed and was replaced with the one Mr Stevenson negotiated, then arguably it was cancelled.

[157] On the material available the sale which did proceed was the one negotiated by Mr Stevenson.

[158] All of this means that, on the face of the matter, the sale to Mantel was not a qualifying sale for Mr Sulusulu.

[159] This finding is declaratory in nature and is not an order of the Authority. If either party seeks an order from the Authority regarding commission payments the party is to make a formal written application to the Authority specifying and quantifying the order sought, and the grounds on which it is sought. The other party shall have 14 days in which to file and serve a written response. Depending on the contents of those documents, the Authority will take matters from there.

[160] If no application has been made by the close of business 28 days from the date of this determination, the Authority will regard the matter as having been resolved and will take no further action in respect of any commission payments.

[161] This time limit will be adhered to. If for any reason a party contemplates making an application but is not in a position to do so within the 28 day period, the party is to advise the Authority of this in writing before the end of the 28 day period, giving reasons and indicating the extension of time sought.

Penalty

[162] Mr Sulusulu's grievance letter of 25 January 2007 also said in part:

“Please also let me have a copy of the wage and time record kept in accordance with section 130 of the Act. In particular, please ensure that the information under s 130(1)(h) is provided so that Phil can check the commission payments made to him up to and including the date of dismissal and the calculation of his holiday pay.”

[163] By letter dated 1 February 2007 Mr Stevenson referred to a 'request for information' contained the 25 January letter, and asked 'please advise which Act you refer.' Mr Stevenson said that matter was not clarified. Accordingly no wage and time record was forwarded.

[164] That explanation is disingenuous. There had already been exchanges between the parties regarding the provision of information and the duty to act in good faith. It is unlikely that either party failed to understand that the Act in question was the Employment Relations Act. Moreover, FBDL was receiving advice from a specialist professional advocate who would not have failed to recognise the reference. In those circumstances I do not accept that FBDL was in doubt about the nature of the request or the basis on which it was made.

[165] Mr Stevenson also said in a statement of evidence that he thought the records had been sent to the author of the 25 January letter. That is not a satisfactory response either.

[166] Section 130(2) of the Act obliges every employer, upon request by an employee or authorised representative, to provide that person immediately with access to a wage and time record. The breach of this provision, and the unsatisfactory explanation, warrants a penalty. FBDL is ordered to pay a penalty in the sum of \$1,000.

[167] Mr Sulusulu asked that the penalty be paid to him personally. Although the Authority has the power to order such payment, there is no reason to exercise it here and I decline to do so.

Summary of orders

[168] FBDL is ordered to pay to Mr Sulusulu:

- a. \$1,000 for loss of the benefit of a vehicle and fuel card during the period of his unjustified suspension;
- b. \$9,660.30 as reimbursement of remuneration lost as a result of his unjustified dismissal;
- c. \$3,000 as compensation for injury to feelings; and
- d. \$1,275.02 (gross) as underpaid holiday pay, if payment has not already been made;

[169] FBDL is ordered to pay a penalty in the sum of \$1,000, with the penalty to be paid into the Authority.

Costs

[170] Costs are reserved.

[171] If either party seeks a determination from the Authority the party shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve any reply. Unless an extension of time has been sought and granted, any memorandum filed outside this timetable will not be taken into account.

R A Monaghan

Member of the Employment Relations Authority