



New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2010](#) >> [2010] NZERA 688

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Weber v Wang AA380/10 (Auckland) [2010] NZERA 688 (23 August 2010)

Last Updated: 10 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 380/10 5285394

BETWEEN

JACOB WEBER Applicant

AND

JASON WANG Respondent

Member of Authority:

Rachel Larmer

Representatives:

Applicant in Person Respondent in Person

Investigation Meeting:

23 July 2010 at Auckland

Determination:

23 August 2010

DETERMINATION OF THE AUTHORITY

- A. **Jacob Weber has a personal grievance for unjustified dismissal and he is entitled to remedies in resolution of his employment relationship problem.**
- B. **Mr Wang is ordered to pay Mr Weber;**
 - (i) **\$303 gross in unpaid holiday pay;**
 - (ii) **\$3,500 pursuant to section 123(1)(c)(i) of the Employment**

Relations Act 2000;

- (iii) **\$5,547.30 lost remuneration pursuant to section 128(2) of the Act;**
- (iv) **\$70 as reimbursement of the filing fee. Employment relationship problem**

[1] Jacob Weber started work on or about 10 August 2009 as a car groomer at the Ace Motors North Shore ("the North Shore yard") and Ace Motors Grey Lynn ("the Grey Lynn yard") car yards ("the yards") and was dismissed from his employment on 18 October 2009.

[2] Mr Weber has raised a personal grievance for unjustified dismissal together with a claim for unpaid holiday pay relating his work on the Grey Lynn yard.

[3] Mr Wang, Jason Wang, sent Mr Weber a text message on the evening of Sunday 18 October 2009 which stated:

"Hi jay. We have got a new groomer. So u don't need to come tomorrow. Lee [the accountant] will make the last payment to you next week. Thanks."

[4] Mr Wang said the purpose of the text was to dismiss Mr Weber during a 90 day trial period, because he was unhappy with his performance. Mr Wang is the manager of the North Shore yard and he says that he only dismissed Mr Weber from the North Shore yard. Mr Wang denies dismissing Mr Weber from the Grey Lynn yard, because he had no authority to do so.

[5] Mr Wang also disputes personally employing Mr Weber, and says that he is not personally trading as Ace Motors North Shore. Mr Wang said that Mr Weber was employed by a registered company named Auto Direct International Limited ("ADIL"), which is trading as Ace Motors North Shore.

[6] Mr Wang's position is that he has nothing to do with the Grey Lynn yard, which is an entirely separate business which is owned and operated by a company called Top Key Limited ("TKL"). He said that TKL was owned by his uncle, Alex Wang and that the Grey Lynn yard was managed by Ian Young.

[7] Contrary to the requirement in [section 65](#) of the [Employment Relations Act 2000](#) for an employment agreement to be in writing, a written employment agreement was never prepared for Mr Weber.

The issues

[8] The matters for determination are:

- (a) Did Jason Wang employ Jacob Weber?
- (b) If so, did he employ Mr Weber on the North Shore yard only or on both yards?
- (c) If employed on both yards, did Mr Wang dismiss Mr Weber from both car yards?
- (d) Was Mr Weber's employment subject to a trial period?
- (e) If not, was Mr Weber's dismissal justified?
- (f) If the dismissal was unjustified what, if any, remedies should be awarded?
- (g) Has Mr Weber been paid all of his holiday pay ?

Relevant facts

[9] Mr Weber named Mr Wang as the respondent because he believed he was his boss. Mr Weber says that Mr Wang was the person who hired and fired him, and who told him what to do when he was at work. He said he had never been told that someone other than Mr Wang employed him.

[10] Mr Weber acknowledged that Mr Young managed the Grey Lynn yard, but said Mr Wang was still the overall boss of both yards, because "*what he said went*". Mr Weber's evidence was that Mr Wang specifically told him that he was dismissed from both yards. Mr Weber says that when he raised this with Mr Young, he was told "*the decision was up to Jason*".

[11] Mr Wang denies having any discussion with Mr Weber about his work at the Grey Lynn yard.

[12] Mr Wang believes he was entitled to dismiss Mr Weber for "*his poor performance during the 90 day trial period law*". It is common ground that Mr Wang did not raise his performance concerns within the context of a disciplinary or performance monitoring process. Nor had Mr Weber received any prior counselling or warnings for poor performance. Mr Weber said he had never been provided with any details about Mr Wang's concerns.

[13] Mr Wang admitted that he had not documented any of his concerns and had no documentation to support his position. The Statement in Reply filed on 2 June 2010 merely states: "*Jacob Weber was fired because of bad performance*", but it does not provide any details of this. The parties did not provide written statements in advance of the meeting.

[14] Mr Wang provided information about his performance concerns for the first time during the investigation meeting. He had three complaints about Mr Weber's performance, namely:

- (a) He did not arrive to work on time;
- (b) His work was of poor quality; and
- (c) Sometimes he did not show up for work at all.

[15] Mr Weber describes receiving the text message from Mr Wang "*out of the blue*". He had no idea that Mr Wang was unhappy with his performance or that his job was at risk. He said he heard about the above concerns for the first time during the investigation meeting.

[16] After receiving the text message, Mr Weber said he called Mr Wang three times, but he did not pick up. Because he couldn't get hold of Mr Wang, Mr Weber said he decided to go to "*secondin rank*", so he called Mr Young, the manager of the Grey Lynn car yard. Mr Young told him he didn't know anything about it, so Mr Weber would have to take it up with Mr Wang the next day.

[17] Mr Weber arrived at the North Shore yard at 9am on Monday 19 October 2009 and waited approximately 1½ hours for Mr Wang to arrive. Mr Wang greeted Mr Weber by saying "jaye, you are no longer needed at this yard" or words to that effect. Mr Wang admits he was not happy Mr Weber was on the yard because he had dismissed him the previous evening.

[18] Mr Weber said that he pleaded with Mr Wang for his job back, and kept asking why he was being fired. Mr Wang agrees that Mr Weber kept asking what had gone wrong, but says that he did not want to get into a discussion about it. Mr Weber's evidence was that Mr Wang eventually referred to the 90 day trial period and poor performance, before walking off. Mr Weber said he still had no idea what the problem was.

[19] Mr Weber's evidence was that he specifically asked Mr Wang if he was fired from both car yards, and that Mr Wang told him he was, and that he was not open to discussion on the matter. Mr Wang said there was no discussion about the Grey Lynn yard, and that he would not have told Mr Weber he was fired from the Grey Lynn yard, because he had no authority to do so.

Identity of employer

[20] The issue over the identify of Mr Weber's employer came up for the first time during the investigation meeting, when I asked Mr Wang to confirm that he was Mr Weber's employer. At that point, Mr Wang stated that he was not personally the employer and that Mr Weber was employed by ADIL. Mr Weber expressed considerable surprise at that.

[21] The difficulties that have arisen in respect of the issue over the legal identity of Mr Weber's employer would have been avoided if the employer had complied with its legal obligation to prepare a written employment agreement for Mr Weber pursuant to section 65 of the Act.

Documents provided to the Authority

[22] Mr Weber, in his Statement of Problem, recorded Mr Wang as "Jason Wang (North Shore, Ace Motors Limited)". A company search by the Authority revealed that there was no such registered company. The Statement of Problem was therefore served on Mr Wang personally as the employer, and he filed a Statement in Reply.

[23] Mr Wang signed in the space for the respondent's signature and he recorded his name "Wenzhou Wang" in the address for service section, to record that he had lodged the Statement in Reply. He did not deny employing Mr Weber, nor did he make any reference to any other entity, such as ADIL or TKL.

[24] There was nothing in Mr Wang's communications with the Authority, which included attending a telephone conference, which indicated that he did not consider himself to be Mr Weber's employer. His emails are signed as "Jason Wang/Ace Motors North Shore", with his contact details being listed below that.

[25] Nor was there anything in any of Mr Wang's email communications with Mr Weber to indicate he was acting as the agent of some other entity, such as ADIL and TKL. Mr Wang's email address was Jason@acemotors.co.nz and he signed his emails "Jason Wang www.acemotors.co.nz".

Ace Motors

[26] Ace Motors is clearly a trading name. It has a banner with the words "Ace Motors" with no distinction being made between the Grey Lynn and North Shore car yards. There is a "company profile" button. That page bears the Ace Motors logo and has a heading saying "Family owned and operated since 2001". The site information talks about "Ace Motors" and the "Ace team". It records that it has "two great locations" and refers to the Grey Lynn yard and the "New Branch - North Shore". The site advertises its toll free number 0800 ACE CAR.

[27] There is nothing on the website that suggests that the Ace Motors business consists of two separate legal entities which are owned and operated by entirely different companies. The overall impression created by the website is that there is one trading entity called Ace Motors which operates two car yards; one on the North Shore and one in Grey Lynn. There is nothing on the website that indicates that TKL was trading as Ace Motors Grey Lynn and ADIL was trading as Ace Motors North Shore. Mr Wang's photo appears on the website under the heading North Shore. Beside the photo is his name, and under that is written "Branch Manager". The same information appears for Mr Young, except his photo is under the heading Grey Lynn.

Respondent's evidence

[28] Mr Wang is a director of ADIL and confirmed that he is referred to on the companies register as "Wenzhou Wang". He said that the Grey Lynn yard was managed by Mr Young, and that Alex Wang (the uncle referred to earlier) had no connection with ADIL. Mr Wang confirmed that Alex Wang was recorded as the sole TKL shareholder on the companies register under the name Ding Yi. Mr Wang said that he had nothing to do with Ace Motors Grey Lynn.

[29] Mr Wang accepted that he did "hire and fire" Mr Weber, and told him what to do, but only in respect of the North Shore

yard only. In response to my question about what, if anything, he did to inform Mr Weber that he was not employed by him personally, Mr Wang replied *"I didn't do anything."*

Applicant's evidence

[30] Mr Weber was very surprised to hear that he was employed by ADIL and that Mr Wang had nothing to do with the Grey Lynn yard. He said that Mr Wang interviewed him, Mr Wang offered him the job at both yards, Mr Wang set his pay rate, Mr Wang told him what to do in terms of grooming duties, and Mr Wang fired him from both yards. All his dealings had been with Mr Wang. He stated that *"everyone saw Mr Wang as the boss and what he said goes"*.

[31] Mr Weber asked how he could possibly have known that Mr Wang was not his employer and stated that as far as he was aware Jason Wang was his employer.

Payslips

[32] Mr Wang suggested that Mr Weber's payslips should have alerted him to the fact that he was not his employer.

[33] Mr Weber admitted receiving payslips whilst employed. These pay slips are headed up *"Ace Motors North Shore"* at the top of the page where you would expect the employer's name to be recorded. Under that is the relevant pay information. At the bottom of the page, under a black base line, and written in such a way that it looks like a footer, are the words *"prepared by: Auto Direct International Limited"*.

[34] Mr Weber says he did not pay any attention to that notation and did not realise that meant he was actually employed by ADIL. This was entirely reasonable. I find as a matter of fact that this sole reference to ADIL is ambiguous. It could easily be a reference to the external payroll company which was responsible for processing the Ace Motors pay run. It did not clearly signify an employer relationship.

[35] Mr Weber's first payslip was received after his first week of work so, even if it had unambiguously identified ADIL as the employer, he still would not have received that information before he accepted the offer of employment that was extended to him by Mr Wang.

[36] Mr Weber produced a second 'pay slip', which he says he received from Ace Motors Grey Lynn some time after his employment had ended. He wasn't sure from whom or how he got it. Mr Wang said that it was not from him.

[37] This 'payslip' was just a list of amounts recording what Mr Weber was paid for each week of his employment, although I note that the payments were not linked to any specified dates. It is markedly different from the ADIL payslip. There is nothing on the document to identify the employer and Mr Weber is identified by his middle name only.

Joining of ADIL

[38] The Authority gave Mr Wang, as a director of ADIL, an opportunity during the investigation meeting to have it joined as a respondent, but he did not wish to do so. The Authority also invited him to make an application, in his capacity as a director of ADIL, to have its name substituted for his own name. Mr Wang did not wish to do that either.

[39] Mr Wang was informed that because Mr Weber's claim was just against him personally, if the Authority determined that he was Mr Weber's employer, then any liability that may arise from his dismissal would be Mr Wang's personal responsibility. Mr Wang confirmed that he understood that.

Subsequent opportunity for respondent to take advice and produce further evidence

[40] At the end of the investigation meeting, I provided Mr Wang with additional time to give him an opportunity to take legal advice and to provide any further evidence regarding the issue of the legal identity of Mr Weber's employer. I also asked for a written statement from ADIL's accountant Mr Lee Liu, clarifying the identity of Mr Weber's employer by reference to the PAYE deductions made from his wages.

[41] Mr Liu emailed an unsigned letter to the Authority dated 27 July 2010 which was headed up *"Ace Motors North Shore"* and which stated that he worked for *"Ace Motors North Shore"* as an accountant. Mr Liu states:

"I certificate [sic] the employment relationship between Jacob Weber and Ace Motors North Shore."

[42] He then provides information about the dates of employment and wage rate, before going on to state:

"I am the person in charge of payroll in Ace Motors North Shore. I deduct the PAYE for every employee and remit it to the IRD."

[43] The Authority also received an email from Jason Wang on 27 July 2010 which stated:

"As you asked from last Friday's hearing, I am now confirm [sic] with you that Mr Wang's name is correct in this matter. Respondent's details remain the same as Jason Wang."

Determination

Did Jason Wang dismiss Mr Weber?

[44] On the question of the identity of Mr Weber's employer, I specifically prefer his evidence over Mr Wang's. Accordingly, I am satisfied that, on the balance of probabilities, that Jason Wang was Mr Weber's employer, and that he is the correct respondent.

[45] The only evidence which Mr Wang could refer to in support of his contention that he was not the employer, is the ADIL payslips. These payslips are ambiguous and do not even identify ADIL as the employer. To conclude that ADIL is the employer would require drawing an inference that the footnote refers to the employer, and not some other pay processing entity. I am not prepared to do so in the absence of any other supporting evidence.

[46] I further note that by the time Mr Weber had received his first ADIL payslip, he had already worked on both yards for a week. Both parties agreed that there was no mention made of ADIL or TKL by Mr Wang when he initially met Mr Weber and offered him a job. It was not open to Mr Wang to unilaterally change Mr Weber's employer to ADIL after he had started work. Mr Weber's agreement to that would have been required, but the issue was never raised with him.

[47] Before arriving at that decision, I have had to carefully consider whether Mr Wang employed Mr Weber at both yards or at the North Shore yard only. This has required a review and assessment of the evidence on that point.

Did Mr Wang employ Mr Weber at both yards?

[48] There is clearly a dispute between the parties about whether Mr Wang employed Mr Weber at both yards. I consider, on the balance of probabilities, that Mr Wang did personally employ Mr Weber to groom cars at both yards.

[49] Firstly, I am not satisfied from the evidence presented to me that the two yards are indeed two entirely separate legal entities, with entirely different owners/operators. I would have to have relied solely on Mr Wang's assertion about that, which I hesitate to do because that distinction is not evident from the Ace Motors website.

[50] The impression deliberately conveyed via its website is that the Ace Motors business is one family owned and operated business, with two yards in Auckland. That situation is consistent with Mr Weber's evidence that Mr Wang was the boss of both yards. I also have regard to the fact that Mr Weber was interviewed by Mr Wang only, and that resulted in him working at both yards.

[51] If Mr Wang, as he says, had nothing to do with the Grey Lynn yard then Mr Weber's presence there is unexplained. There is clearly a very close association between the two yards. Mr Wang had an opportunity after the investigation meeting to present evidence from the owner/operator of the Grey Lynn yard confirming that it, and not Mr Wang, had employed Mr Weber. It would have been easy for him to do so but he did not avail himself of that opportunity.

[52] I accept Mr Weber's evidence that he genuinely believed that he was entering into an employment relationship with Jason Wang personally for employment on both yards, and that there was nothing to suggest that was not the case. Mr Wang accepts he did not say or do anything to inform Mr Weber that he was acting as an agent.

Doctrine of undisclosed principal

[53] Mr Wang accepts that he did not do anything to notify Mr Weber that he was employed by some entity other than him. Mr Wang has not convinced me that his role was as an agent only rather than acting in his personal capacity. However, even if he was an agent, I find that he did nothing to draw that agency relationship or the identity of any principal employer(s) to Mr Weber's attention before he accepted the offer of employment extended by Mr Wang. Nor was anything done to advise Mr Weber of the agency relationship before he started work, or for that matter at any time thereafter.

[54] Even if I am wrong in finding that Mr Wang personally employed Mr Weber at both yards, and he was in fact only acting as an agent for others (such as ADIL and

KTL) the 'doctrine of undisclosed principal' would apply. The Court recognised this doctrine in *Cuttance (t/a Olympus Fitness Centres) v Purkis* [\[1994\] NZEmpC 181](#); [\[1994\] 2 ERNZ 321](#).

[55] The doctrine allows Mr Weber to choose whether to pursue Mr Wang personally notwithstanding he may be an agent only, or the undisclosed principals. Mr Weber has elected to pursue Mr Wang and I find he is legally entitled to do so.

Did Mr Wang dismiss Mr Weber from both yards?

[56] Mr Wang admits dismissing Mr Weber from the North Shore yard only. Mr Weber says he was specifically dismissed from both yards. I have resolved this conflict with regard to the evidence and find that Mr Wang dismissed Mr Weber from both car yards.

[57] Mr Weber's evidence was that "Mr Wang was the boss of the yards, what he said went" He referred to Mr Young's comments to him to the effect that his dismissal was out of his (Mr Young's) hands and that "what Jason says goes". He also relies on the fact that Mr Wang expressly told him that he was dismissed from both yards. In contrast to that, Mr Wang maintains there was no discussion at all about the Grey Lynn yard.

[58] I consider it highly likely that Mr Weber did ask about his employment at the Grey Lynn yard. His employment situation was clearly at the forefront of his mind. He turned up at the yard to discuss that with Mr Wang, who was reluctant to do so.

[59] Mr Weber was clearly proactively taking steps to clarify his employment situation. He called Mr Wang three times on Sunday; he raised his concerns with Mr Young who he describes as "the second in rank"; he had followed Mr Young's advice that he had to take the matter up with Mr Wang; and he had waited an hour and a half at the North Shore yard for Mr Wang to show up. He was also insistent in asking what went wrong and was not out off by Mr Wang's initial brush off that he was not needed at the yard.

[60] I consider that Mr Weber's actions demonstrate determination and persistence, so it would be surprising if he had not raised the issue of his employment at the Grey Lynn yard when he considered Mr Wang was the overall boss of that yard also. He went to Mr Wang to plead for his job back, so it is entirely credible that he attempted to explore the opportunity of continuing at the Grey Lynn yard.

[61] It is also obvious that Mr Wang was dismissive and did not want talk to Mr Weber. Mr Wang was of the view was that he had already dismissed him, it wasn't up for discussion, and that he wanted him off the yard.

[62] Mr Weber's evidence was that a couple of hours after meeting with him, Mr Young called him to offer him two more weeks' work on the Grey Lynn yard. If he had not been dismissed from both yards, there would have been no reason for Mr Young to call with that offer.

Trial period

[63] Section 67A of the Act requires a trial period to be recorded as "a written provision" in an employment agreement. No written employment agreement was prepared for Mr Weber, so it follows that there was no trial period provision. Accordingly, Mr Weber is not precluded by section 67B(2) of the Act from pursuing a personal grievance as a result of his dismissal.

Was dismissal justified?

[64] The trial period explanation is not available to Mr Wang, which leaves him attempting to justify the dismissal on the grounds of performance concerns.

[65] The section 103A justification test in the Act requires the Authority to determine, on an objective basis, whether Mr Wang's actions, and how he acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. This requires consideration of Mr Wang's specific performance concerns and an examination of the action he took about his concerns.

Performance concerns

(i) Timekeeping

[66] Mr Wang said he spoke to Mr Weber twice about his timekeeping after observing he was late to work a few times. The first time he told Mr Weber that he had to be at work at 9am and that he could not be late. The second time occurred a few days later when he noticed Mr Weber was late again. Mr Wang said he asked Mr Weber why he was late, and when Mr Weber told him it was due to traffic problems, he told Mr Weber that traffic issues were not his problem, so Mr Weber would have to leave home half an hour earlier to ensure he got to work by 9am.

[67] Mr Weber denies that either conversation took place. He says he did not know he had to be at work by 9am sharp. He said it took ten minutes to unlock the yard and he was paid per car groomed, so he didn't think it would matter if he was not there on the dot of 9am. I find that even if these two conversations did occur, they were insufficient to put Mr Weber on notice that his timekeeping was a problem he had to address.

[68] Mr Wang has also been unable to satisfy me that there was an agreement that Mr Weber had to start at 9am. It was open to Mr Wang to have recorded a specific start time for Mr Weber in an employment agreement, but that did not occur. In the absence of agreement over the start time, it was unreasonable for Mr Wang to unilaterally insist on Mr Weber being at the yard by 9am, particularly when Mr Weber was paid per car groomed, not by the hour.

(ii) Poor quality work

[69] In terms of Mr Wang's concerns about the poor quality of Mr Weber's work, the only example he could give the Authority was that he felt that Mr Weber used an excess of oil on the car engines. He complained that Mr Weber was washing

the engine bay of the cars by spraying too much silicon on them which made the engine too shiny or oily. He believed that Mr Weber was doing that because it made the car look good without him having to wash it properly.

[70] Mr Weber accepts that on one occasion, shortly after starting work, he was asked not to put too much silicon on the engines. He says he took that on board, cut back on the oil, and it was not raised again.

[71] Mr Wang accepted that there had been no induction or training for Mr Weber, who had began grooming cars as soon as he started work, and that he had never shown or told Mr Weber how he wanted the cars groomed. It was unreasonable for Mr Wang to have relied on this issue as a performance concern without having first given Mr Weber clear instructions about what was required and, if appropriate, guidance or training.

(iii) Not turning up to work

[72] Mr Wang's evidence regarding his concern about Mr Weber's failure to turn up to work ("no shows"), was that it first occurred in the second to last week of his employment and then again in his last week of work. Mr Wang said he spoke to Mr Weber the first time, telling him he had to call in if he was not going to make it to work, he couldn't just not show up. He accepts that he didn't raise it again.

[73] In terms of the no shows which allegedly occurred in the last week of Mr Weber's employment, Mr Wang initially said that Mr Weber did not turn up at all. When queried about why Mr Weber had been paid for work done during his last week if he was not there at all, Mr Wang then said he thought that Mr Weber may have turned up once and failed to show up twice for work in his last week.

[74] Mr Wang said he was personally aware of the first "no show" because he had attempted to contact Mr Weber unsuccessfully. He said he raised it with Mr Weber the next time he saw him by asking him why he hadn't been at work. Mr Wang's response was that he had been sick but that he called and left a message with a colleague to say he was sick.

[75] Mr Wang accepted that there was no defined reporting procedure for sickness absence, which I note was another issue that could have been covered in an employment agreement, had Mr Weber been provided with one. Mr Wang was also unable to provide the date on which the first "no show" occurred.

[76] In terms of the subsequent "no shows", Mr Wang was vague on details. He wasn't sure whether he had observed these subsequent "no show(s)" personally or if they had been reported to him by others. He thought they might have occurred whilst he was in Japan, because he didn't have a clear recollection about them. That lead him to conclude that someone must have called him while he was away to say that Mr Weber had not turned up. He was unable to confirm the dates on which these incidents occurred.

[77] Mr Wang agreed that he did not take any steps to investigate whether Mr Weber had reported in on the days he apparently did not show up. He also agreed that he did not make any inquiries with Mr Weber as to why he may not have been at work.

[78] Mr Weber's evidence was that he had never failed to turn up to work and that if he was not at work then he called to let them know he would be away. He said he did have a couple of days off sick but wasn't sure what dates he was away.

[79] Mr Wang said he did not discuss his concern about the alleged no shows with Mr Weber because by then he just wanted to end the employment.

Dismissal unjustified

[80] I have no hesitation in finding that a fair and reasonable employer would not have acted in the way in which Mr Wang did. Even if Mr Wang had been able to establish that the matters he sought to rely on had actually occurred, a fair and reasonable employer would not have dismissed Mr Weber in all the circumstances.

[81] Mr Wang's concerns were simply not capable of amounting to serious misconduct. I find that the concerns which Mr Wang sought to rely on were at the lowest end of the scale, and on the facts presented, would not have justified a first warning, much less summary dismissal.

[82] There was also a complete absence of any kind of process or fair procedure, and Mr Wang did not comply with even the barest minimum elements of natural justice or his statutory good faith obligations.

[83] Mr Wang did not make his expectations in terms of starting times, sickness absence reporting, and work quality clear to Mr Weber. Nor did he fully or fairly put his performance concerns to Mr Weber, who was therefore deprived of the opportunity to respond to them. Mr Weber was not given any training and he had no genuine opportunity to improve. Mr Wang did nothing to assist Mr Weber to meet his performance expectations.

[84] Mr Wang could not point to any evidence to establish that he had conducted even a cursory investigation into any of the concerns he sought to rely on. He had no absolutely no documentation about his concerns and could not provide even basic

information about the times and dates Mr Weber was allegedly late to work or did not show up.

[85] Mr Weber's dismissal was clearly unjustified because Mr Wang did not conduct any investigation, much less a fair or proper one, which disclosed conduct capable of being regarded as serious misconduct.

[86] Mr Wang's actions, and how he acted, in connection with his concerns about Mr Weber's performance were not what a fair and reasonable employer would have done in all of the circumstances. His dismissal of Mr Weber was quite clearly substantively and procedurally unjustified.

Holiday Pay

[87] Mr Weber also claims \$303.00 in unpaid holiday pay which relates to the hours he worked at the Grey Lynn yard.

[88] Mr Weber says he did not receive any holiday pay for the hours he worked on the Grey Lynn yard. The 'pay slip' he produced showed that his holiday pay amounted to \$303.00. Mr Weber said this was never paid.

[89] Mr Wang denies responsibility for any outstanding holiday pay, saying it related to the Grey Lynn yard. However, I have already found as a matter of fact that Mr Wang employed Mr Weber to work on the Grey Lynn and North Shore yards. Accordingly, Mr Wang is responsible for ensuring that Mr Weber received his holiday pay. There is no evidence before me to establish that has occurred. I therefore accept Mr Weber's evidence that he is owed \$303 in holiday pay.

[90] Accordingly, Mr Wang is ordered to pay Mr Weber \$303.00 gross holiday pay.

Remedies

Contribution

[91] I find that Mr Weber did not contribute in any way to the situation that gave rise to his unjustified dismissal and that there was no blameworthy conduct on his part which would constitute contributory fault. Accordingly, there is no basis for reducing the nature and extent of the remedies to be granted under s124 of the Act.

Compensation under s123(c)(1)(i) of the Act

[92] Mr Weber's evidence was that he was shocked and humiliated to be fired by text message. He said he received it out of the blue and did not have any idea that his job was at risk. He felt that Mr Wang showed an absolute disregard for him as an individual and he found that very distressing. He was embarrassed to have to turn up at both yards and to have to plead for his job back.

[93] Mr Weber was also embarrassed to tell his family that he had been fired and he was hassled by them for losing his job. He had to go on the unemployment benefit while he was looking for work.

[94] Mr Weber described how being fired resulted in him losing confidence, particularly when it took him so long to find another job. He felt under financial pressure over the Christmas period, because although he received the unemployment benefit, it was not enough money to survive on. He could not pay his sister his share of his board without any income, so he ended up owing her money.

[95] I am satisfied that Mr Weber did suffer humiliation, loss of dignity, and injury to his feelings as a result of his unjustified dismissal. Having regard to Mr Weber's evidence, the limited duration of his employment, and the general range of awards in cases of this kind, Mr Wang is ordered to pay Mr Weber the sum of \$3,500 as compensation pursuant to [s.123\(1\)\(c\)\(i\) of the Employment Relations Act 2000](#).

Mitigation of loss

[96] Mr Weber is seeking lost remuneration, so he has a legal obligation to take steps to properly mitigate his loss. As a result of his dismissal Mr Weber had to go on the unemployment benefit while he sought alternative work. I am satisfied that Mr Weber took reasonable and appropriate steps to mitigate his loss following his unjustified dismissal. It was not unreasonable for him to reject Mr Young's belated offer of two more weeks' work on the Grey Lynn yard only in order to focus his time and attention on finding new permanent work.

[97] Mr Weber proactively attempted to find alternative employment. He cold called a car groomer on the North Shore looking for work and he sent about 40 CVs out from the time of his dismissal until mid-January. He also applied for work at Pak'N'Save, Countdown and Woolworths supermarkets. I am satisfied that he took reasonable and appropriate steps to properly mitigate his loss.

Reimbursement of lost remuneration

[98] Mr Weber was out of work for three months from 19 October 2009 to 19 January 2010 during which time his only income was the unemployment benefit. He ultimately managed to secure an electrical apprenticeship which commenced on

20 January 2010.

[99] I am satisfied that Mr Weber has lost remuneration as a result of the personal grievance and there is no good reason why he should not be reimbursed for his lost income. Section 128(2) of the Act requires him to be reimbursed the lesser of his actual lost remuneration or for three months' lost remuneration.

[100] Mr Weber was employed for 11 weeks over the period 8 August to 16 October 2009. He earned a total of \$5,085.10 gross over this period which averages out to \$462.28 per week. Mr Weber is entitled to 12 weeks lost remuneration calculated at the rate of his average weekly earnings.

[101] Accordingly, Mr Wang is ordered to pay Mr Weber lost remuneration of \$5,547.3 gross.

Other

[102] Mr Weber is entitled reimbursement of the \$70 filing fee. **Costs**

[103] Both parties were unrepresented, so no order for costs is made.

Rachel Larmer

Member of the Employment Relations Authority

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZERA/2010/688.html>