

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 361/10
5129374

BETWEEN MUKESH ARORA
Applicant

AND SATO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Ken Nicholson for Applicant
Jo Douglas for Respondent

Investigation Meetings: 17 and 18 December 2008, 19 February, 9 April, 14 July
2009

Further information
received 22 July 2009

Submissions received: 14 and 27 August 2009 from Applicant
20 August 2009 from Respondent

Further information
received 18 September, 9 October 2009 from Applicant,
2 October 2009 from Respondent

Further Submissions
received 15 October 2009 from Applicant
8 October 2009 from Respondent

Determination: 17 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Respondent (SATO NZ) specialises in labelling and “*data collection solutions*.” It is part of the worldwide SATO group with a parent in Japan. From June 2006 Mr Arora was employed by SATO NZ as its General Manager, Shared Services. Both parties agree that this role was essentially that of a Financial Controller. Mr Arora was summarily dismissed in June 2008. The reason given for the dismissal was

that he had provided false and misleading information to SATO's external auditors during the audit for the year ending March 2008.

[2] Mr Arora denies the allegation against him and says that the termination of his employment was unjustified. In relation to his personal grievance he claims remedies of lost remuneration including car and petrol allowance, parking charges, reimbursement of professional membership fees previously paid by SATO NZ, health insurance premiums, pay in lieu of notice, compensation for hurt and humiliation and for loss of reputation and costs, including fees for preparation of what Mr Arora regarded as expert evidence.

[3] Mr Arora also claims that he is owed outstanding bonuses for the period leading up to his dismissal. SATO's position is that the bonuses in question were performance related and are not payable in circumstances of dismissal for serious misconduct.

Issues

[4] The issues for determination are therefore:

- i. whether the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred;
- ii. if not, what remedies are appropriate and to what extent, if any, remedies should be reduced for contributory conduct;
- iii. whether SATO owes Mr Arora bonus payments.

[5] The Authority's investigation in this matter took a somewhat fragmented form due to the fact that not all of the applicant's evidence was ready for presentation in accordance with the timetable originally agreed. Having initially been set down for two days it eventually ran for five and was held open for several months after the final investigation meeting to permit the tabling of additional information from the applicant and for the respondent to respond.

[6] As a result the Authority was presented with a very large body of documentary evidence and numerous witness statements including several from third parties and previous employees of the Respondent. Given the piecemeal way in which this was presented it was necessary to review all the evidence before commencing this determination. It has unfortunately been delayed as a result. I note also that for reasons of economy this determination outlines only the main points of that evidence.

(i) The dismissal

[7] Mr Arora has a degree in costing from the Institute of Costs and Works Accountants of India. He is also a New Zealand Chartered Accountant and a Chartered Certified Accountant in the UK. Immediately prior to June 2006 Mr Arora was employed as Financial Controller for the Walker Group of companies. When SATO NZ acquired Walker Datavision Limited (a major company within the Walker Group) he was offered and accepted the position of Manager, Shared Services in the new company. In that role he was responsible for Logistics, Finance and IT.

[8] Neither the scope of Mr Arora's role nor his specific duties remained unchanged while he was with SATO NZ however the respondent says that it was always the core of his job to ensure that the company had systems in place which would provide accurate financial reports. It said that these reports were expected to include accurate information on the value of stock, and the amount of aged and obsolete stock held. For a substantial part of Mr Arora's time with Sato he was also responsible for stock and inventory.

[9] When Mr Arora started at SATO NZ Badi Ala'i was the Managing Director. For a brief period after Mr Ala'i left in May 2007 his position was taken by Nicole McKenzie. No employment issues appear to have arisen for Mr Arora when either Mr Ala'i or Ms McKenzie held the role of Managing Director.

September 2007 stock take

[10] In August 2007, Mr Paul Ryan took over the role of managing director of SATO NZ. On commencing employment with SATO NZ he discovered a number of

problems. The first of these was that the warehouse was disorganised and required a stock take. This was done in September 2007. It revealed that \$480,000.00 worth of stock was missing. Two further stock takes confirmed this finding. Mr Ryan told the Authority that he held Mr Arora responsible for the inaccurate reporting, and told him so. It was his view that even if the operations manager (who looked after the warehouse) had caused the problem, it remained up to Mr Arora, her direct manager, to address it.

Audit for year ended March 2007

[11] On 23 October 2007 SATO NZ's auditors presented their management letter for the year ended 31 March 2007. It noted:

“during the audit we experienced delays in receipt of information, difficulty with access to key staff, lack of reconciliations being available and no goodwill impairment calculation having been performed.”

[12] The auditors also reported that SATO had tax penalties outstanding. Since Directors can be held personally liable for such obligations Mr Ryan elected to hold off signing his own Director's appointment forms until the tax issue was resolved and the penalties paid. As before, he held Mr Arora responsible for not having addressed this issue sooner.

November 2007 (half year) audit

[13] By the time of the presentation of the management letter for the year ended March 2008, the half year audit had almost come round. Mr Ryan decided that for this, SATO NZ should engage new auditors and decided to use Deloitte, the firm used by the SATO Group globally. He did so partly in response to concerns Mr Arora had expressed about the performance and cost of the firm used previously.

[14] The fiscal half year audit was conducted in November 2007. At that time, provision had yet to be made in the accounts for the missing stock problem that had been picked up in the September stock take. As is standard practice, the auditors required from Sato, as client, a “representation letter” providing undertakings that the

accounts were correct and that all relevant information or variances in the accounts had been disclosed. Mr Arora drafted such a letter for Mr Ryan to sign however it made no reference to any stock discrepancy. Mr Ryan contacted the auditors to correct the omission and told Mr Arora that: *“in future he must not ask me to sign a representation letter knowing it is not correct.”*

[15] Mr Ryan told me that in the course of the audit conducted in November 2007 the auditors also told him that they believed that Mr Arora did not understand the Goodwill Impairment Model.

December 2007 disciplinary meeting

[16] As managing director of SATO NZ, Mr Ryan reported to the Managing Director of SATO International Asia Pacific, Mr Lim Yee. In December 2007 Mr Yee and Mr Kushida (Chief Financial Officer of SATO International Asia Pacific) visited New Zealand to assess the stock position and resolve the issues with the missing stock. Meeting with Mr Arora did not allay the concerns Mr Ryan and Mr Yee had over the inaccuracies and variances in the stock reports. Mr Ryan was also concerned about imbalances in the general ledger and inconsistencies between the figures reported for cash flow and profit.

[17] Mr Arora was called to a formal disciplinary meeting on 10 December 2007 to discuss these issues. At the conclusion of the meeting it was decided not to proceed with any disciplinary action. Nonetheless Mr Ryan remained concerned that Mr Arora did not understand the responsibilities of his role and reiterated to him that: *“it was imperative that financial reporting be accurate.”*

[18] Mr Ryan said this was reinforced in January 2008 in a conference call between himself, Mr Yee and Mr Arora in which it was stressed to Mr Arora that they held him accountable for the stock figures. He said they told him that: *“the Company’s position was that ... [the] Financial Controller owned the accuracy of the information in our financial systems.”*

[19] Mr Ryan’s concerns did not abate as the New Year progressed. In early 2008 he had occasion to talk to Mr Arora about imbalances in GST figures and also about

discrepancies between sales reports generated by sales managers and those generated by Mr Arora. He also discussed with Mr Arora whether there might be problems with the information management system (“Greentree”) but Mr Arora expressed the view that there was nothing fundamentally wrong with it.

April 2008 (full year) audit

[20] Having already encountered one problem with inventory (the missing stock) Mr Ryan was concerned that there might be others. At the start of the audit for the year ending 31 March 2008 he said so to auditor Andrew Dick.

[21] On 29 April 2008, Mr Arora the audit team with an inventory report which showed aged inventory at approximately \$235,000.00. In his cover email Mr Arora told Ms Clements:

“As asked, please find the ageing report taken after 31st March 08.

As ageing report is real time report, it will not match with the balance sheet number, but it will give an indication of the stock ageing. Green tree system do not allow us to take out back dated ageing report.”

[22] The figure shown did not raise any alarm bells for the auditors, but Mr Ryan was not prepared to take it at face value. There was a simple reason why not. He said that he had noticed that the warehouse contained lots of boxes bearing stock take stickers from several successive stock takes, thus indicating that they had been there for some time. He told me that the figure of \$235,000.00 seemed too low to tally with what he had seen.

[23] The next day he, Mr Dick and Mr Arora met to discuss the aged inventory figures. Mr Arora advised Mr Ryan of a further problem with Greentree¹ (besides the fact that it was a real time report): when there was a stock movement, it re-dated the inventory. Hearing this, Mr Ryan concluded that the aged inventory report was

¹ There was also a third: the stock which had come over from Walker Datavision had been re-aged at the time of the merger. This was less critical however since that stock showed as over a year old anyway, and some stock had been written off at the time of the Walker Datavision acquisition.

completely useless.” It could not tell him what he needed to know: how much old stock there was, what stock was saleable and whether any had to be written off.

[24] Of the four categories of stock Sato had, one was more likely than the others to contain aged stock that might need to be written off. This was “*labels and tags*” which contained products made with perishable adhesive. A further meeting was held between Mr Ryan, Mr Arora and the auditors on 5 May at which it was decided that Deloitte would run a query report on “*labels and tags*” to establish how much stock there was in this category over one year old.

[25] This produced a figure of \$244,000.00: more than the 29 April figure for the entire inventory. It was clearly necessary to move on to considering whether an obsolescence provision was called for in relation to any of this stock.² This would require a line by line assessment of the saleability of the stock: a task for SATO NZ’s logistics and sales managers.

[26] On Wednesday 7 May, while Mr Ryan was in Singapore, Mr Arora convened a telephone conference with Mr Ryan, and the sales and logistics managers. During the call the logistics manager, Ms Winsborough, raised a concern that there could be problems in other categories besides “*labels and tags.*” Specifically she thought there might be valuation issues in relation to stock in the “*FIS*”³ category that had been brought over from Walker Datavision Limited.

[27] What happened next is a matter of dispute between the parties. Mr Ryan says he instructed Mr Arora to:

“investigate and report on these other categories as we could not hide anything during the audit process...I expected that Mukesh would then have informed the auditors of the problems in the other categories...following this phone conference.”

² Although new stock might sometimes be obsolete, as for example when a client changed its mind about a customised order, most obsolete stock was to be found among stock aged over one year.

³ “*FIS*” was a hardware stock line. The remaining two categories were essentially spare parts and software (which had no inventory.)

[28] Mr Ryan was still away in Singapore on Thursday 8 May and Friday 9 May. On 8 May Mr Arora copied Mr Ryan into an email he sent the auditors updating them on the work that had been done on labels and tags. It concluded with the words: *“this will answer your queries and will enable you to close the 2007-2008 audit.”*

[29] Mr Ryan’s first day back in the New Zealand office was Monday 12 May. On 13 May Mr Arora left a representation letter on Mr Ryan’s desk for his signature. This time it had been drafted by the auditors rather than by Mr Arora. It contained no reference to the potential aged inventory problem with “FIS” stock. That evening Mr Ryan told Mr Arora and the auditors he could not sign it as it was, because of a concern that the remaining stock categories, not just labels and tags, required further analysis to identify how much stock they contained over one year old. Andrew Dick responded by saying that he had not been advised that there was likely to be a material problem with the other categories.

[30] Detailed analysis of other categories subsequently showed that in total as much as \$1.2 million of stock could be aged over one year, compared to Mr Arora’s initial “indicative” figure of \$235,000.00. Mr Ryan put this in context by explaining that total stock at that time was valued at \$2.8 million. Some of this aged stock would have little or no net realisable value and to address that issue, an obsolescence provision of \$393,000.00 was made within the accounts.

June 2008 disciplinary process

[31] On 29 May 2008, when the audit was substantially completed Mr Dick wrote to Mr Ryan setting out the auditors’ concerns about audit issues and delays. He noted:

“Inventory Obsolescence

This was the most significant area that required additional audit effort at year end. The key reasons for this were:

- 1. SATO had no allowance for obsolescence as at 31 March 2008 and had not performed an exercise to quantify any potential issue at the commencement of the audit*

2. *At Deloitte's request an inventory aging report was produced to assess potential obsolescence. Work was then undertaken on this report only to discover that the report did not provide a correct aging of inventory but rather the report aged inventory by the last date an item for that product line was sold. For example this report presented the total value of a product line as current even if the last item may have been manufactured 2 years ago providing that 1 item of inventory had recently been sold.*
3. *Accepting this issue SATO then asked Deloitte to run a query report on Labels and Tags inventory to calculate the numbers of months or years of inventory on hand based on the prior year sales. SATO requested Deloitte to run the query on the basis that SATO did not have the relevant expertise to produce the report...*
4. *Having completed the work above SATO then revisited their belief that no obsolescence provision was required for other inventory lines and requested Deloitte to perform similar analysis on FIS inventory. On completing this work SATO then informed Deloitte that SATO were undertaking a further review of other inventory balances...*

In total the inventory issue took over two weeks to resolve..."

[32] All this, of course had led to an increase in the auditors' fee and delayed the completion of the audit. This had affected the Japanese parent, which needed the information from its subsidiary by 20 April in order to meet its reporting deadline at the Tokyo stock exchange (15 May.) Also, as Mr Ryan told the Authority: *"it was not the role of the auditor to actually obtain accurate information on behalf of the company."*

[33] He expected the Financial Controller to produce accurate reports prior to the audit taking place, and to alert him (as managing director) to any need to make or

increase the provision for obsolete stock in the accounts. Mr Ryan told the Authority that:

“in light of previous advice given to Mukesh that he was responsible for accurate reporting, I felt that he should have been aware of his obligations to provide accurate and timely reports.”

[34] On 4 June Mr Ryan wrote to Mr Arora, enclosing Mr Dick’s letter of 29 May and calling him to a disciplinary meeting to discuss the allegation that he:

“misled or obstructed Deloitte in carrying out their audit” and

“provided inaccurate or false information to Deloitte about SATO’s inventory aging.”

[35] Disciplinary meetings followed on 10 June, 12 June and 13 June, at which Mr Arora responded to the allegations against him. Mr Arora also tabled a written explanation with a substantial bundle of documents.

[36] Mr Ryan put two main areas of concern to Mr Arora for comment:

- i. that the aged stock figure from Greentree (provided to the auditors on 29 April) was inaccurate and that Mr Arora had not advised Mr Ryan or the auditors of this, and
- ii. that after learning in the telephone conference of 7 May that there could be inaccuracies in all stock categories, Mr Arora failed to pass on this information to the auditors. Instead, on receiving the “*representation letter*” from them he presented it to Mr Ryan for signing knowing that it did not set out the full extent of the problem relating to the aged inventory.

Mr Arora's explanations

[37] The summary which follows is drawn principally from the minutes of the three disciplinary meetings and the written response tabled by Mr Arora during the disciplinary process. Along with email and other correspondence between Mr Arora and the auditors, and Mr Ryan's own first hand knowledge of events, this was the material Mr Ryan had before him in making the decision to dismiss. I am satisfied that no new explanation was provided to the Authority that was not put to Mr Ryan during the disciplinary process although some points were clarified or expanded upon in evidence.

[38] Mr Arora maintained that he had put Mr Ryan on notice that there were inventory problems in late 2007 by means of the representation letter for the half year audit, which he had drafted for Mr Ryan to sign. That letter (dated 13 November 2007) stated: "*We have disclosed to you the potential for a material variance in Sato New Zealand's Limited's stock on hand.*"

[39] The comment "*potential big number*" had been hand written in the margin of the draft Mr Arora presented to Mr Ryan for signing. Mr Ryan told the Authority that he understood this to be a reference to the missing stock issue. He said that Mr Arora made no mention, at that time, of any further issue relating to aged stock.

[40] Mr Arora also noted that in December 2007 he and Mr Ryan had email exchanges about slow moving stock. Mr Ryan responded to this by saying that the discussion related to stock which was 120 days and over which is not the same as aged stock (stock over a year old) and did not give rise to the need for an obsolescence provision.

[41] Mr Arora accepted that the aged inventory figure provided on 29 April was not precisely correct, and said that he advised the auditors of this by noting that it would merely "*give an indication of the stock ageing.*" Mr Ryan says that the figure did not even give an indication; it turned out to be completely wrong.

[42] During the Authority investigation meeting Mr Arora spent some time addressing the question of just how far wrong the April 29 number actually was. This

was partly because Mr Ryan had said that (during the disciplinary process) Mr Arora had been inconsistent in what he said about the April 29 number. Mr Ryan said that Mr Arora had swung from saying that the number was inaccurate, to saying that he did not know the number was wrong, and that the Greentree system was to blame for any inaccuracies.

[43] Mr Arora told the Authority that he had always known that the figure might under represent aged stock (because it was a real time report and because of the re-dating problem) but he had not thought it would be out by much. He said that he consistently said the same thing: that he knew the 29 April number was not 100% accurate but expected it to give a reasonable indication subject to a degree of uncertainty as a result of the vagaries of the Greentree system. He still does not accept that the “real” figure could be as high as the Deloitte’s analysis suggested.

[44] Mr Arora agreed that limitations in the Greentree system caused inaccuracies in the reports, and noted that it was he who had informed the auditors that Greentree re-dated stock when an inventory item was sold. He maintained that the Greentree consultant had told him there was no way to fix this problem, and that the only other way to get an aging report was to provide a summary of total sales during the year and a summary of closing inventory in hand and compare that by running the report to see which items had been sold and which had not.

[45] Mr Ryan’s view was that Mr Arora should have done just that. He considered it Mr Arora’s responsibility (knowing Greentree was not wholly reliable) to organise an alternative way of checking the amount of aged stock. The approach he mentioned was, according to Mr Dick, a commonly used tool for putting a figure on aged and obsolete stock, and was what Deloitte used to establish their alternative figure for aged stock. Mr Arora told the Authority he simply never thought of it at the time.

[46] During the disciplinary process Mr Ryan spoke with the Greentree consultant, Trevor Vernon, who confirmed that there was an issue with re-dating and said the system was not appropriate for non-durable items. Mr Ryan reported that the consultant advised him that for such stock: *“you need to use a simple lots tracking system with expiry dates... this is a simple change that can be made in the system.”*

[47] At Mr Arora's request, Trevor Vernon gave evidence to the Authority and explained in more detail some of the issues which caused the aging to be incorrect. It was clear from his evidence that well before the events of April 2007 he and Mr Arora had discussed the fact that the aging from Greentree was wrong and that alternative methods needed to be employed to correct it. However Mr Vernon shared Mr Arora's view that none of the problems identified with Greentree were enough to cause the level of disparity that was identified through Deloitte's additional analysis. He said that discrepancies of that size are likely to involve poor warehousing practices.

[48] Mr Ryan says that during the disciplinary process Mr Arora advanced the view that he was responsible for producing the reports, not for ensuring their accuracy, which was a matter for the auditors to assess. Mr Ryan says that Mr Arora suggested that any inaccuracies in the reports should be taken up with Greentree. In his evidence Mr Arora disputed that this was how he put things, saying that he had actually said that he gave the auditors what he understood they needed, in the belief at the time that it was correct. (It was established during the Authority investigation that through an oversight the auditors failed to comply with usual practice and provide Mr Arora with a detailed list of the information required to complete the audit.)

[49] Mr Ryan said that he held the Financial Controller responsible for making sure that reporting systems worked, and had told Mr Arora on 12 June: "*it is not sufficient simply to push a button and hope its okay.*"

[50] Mr Arora also told the Authority that for stock lines which were durable (a significant proportion of Sato's stock) there were no serious consequences if the figures were a little out. This was, as I understood him, because the stock would have held its Net Realisable Value (NRV) and there would be no need for an obsolescence provision in the accounts. In any event, as Mr Ryan accepted, the Financial Controller was unable to assess the saleability of stock and was certainly not responsible for establishing its NRV. (A secondary exercise requiring a line by line evaluation of stock and undertaken once the aged stock is identified.)

[51] Mr Arora said in his written response that no additional stock obsolescence losses or NRV value related losses had been budgeted for 2007-2008 or 2008-2009. He also told the Authority that the accounts had always had some provision for

obsolescence and that in normal circumstances he would have expected this to cover any additional requirement that might have arisen in relation to aged stock. However, this provision had been utilised at half-year to address the missing stock issue, leaving no provision for the aged stock problem which came up at year end. He asserts that he cannot be held responsible for this.

[52] Mr Ryan could not see the relevance of this point since the problem had to be addressed, whether it had been budgeted for or not. He was also alarmed by these comments from Mr Arora's written statement :

“as SNZ suffered big loss as a result of Sep 07 stock take the Company was not in a position to make a further provision on account of obsolete stock or NRV related losses.

The provision for obsolete stock account has always been reported to Sato International every month and it has never been decided or told to make further provision or leave some provision in the accounts for future obsolescence or NRV related losses.”

[53] Mr Ryan said that none of this reflected any discussion he had been privy to. He said that Mr Arora seemed to imply that provision which should by rights be made would not be, in order to make the profit figures look better. This was not Mr Arora's call to make, but more importantly, would be a serious breach of reporting obligations. The fact that Mr Arora made these comments indicated to Mr Ryan that he had a poor understanding of the seriousness of the issues at the heart of this matter.

[54] As for the telephone conference of 7 May Mr Arora recalled this somewhat differently to Mr Ryan. He did not accept that Mr Ryan had requested further analysis of the other stock categories. As far as the audit was concerned, he thought what was agreed on 5 May still stood: there would be an obsolescence provision to deal with the aged stock in labels and tags only. He thought no further provision needed to be made and therefore did not mention this to the auditors, or suggest any that anything further needed to be done to the representation letter. When the draft arrived from the auditors with a request that Mr Arora get Mr Ryan to sign it, he simply printed it off and left it on Mr Ryan's desk.

[55] The logistics manager who was present on the call, Ms Winsborough, attended the Authority investigation meeting under summons. She confirmed that it was she who raised the issue of the other three categories and did so because she knew they contained old stock. She said the conference discussed how to identify aged stock that was not saleable but the emphasis was still on labels and tags with the general consensus being that there was a need to make that category the immediate priority. She said Mr Ryan instructed her and the sales manager to work on assessing the saleability of labels and tags on an urgent basis (over the next couple of days.) Other categories were to be reviewed at a later date (which was not specified.) The logistics manager could not recall Mr Ryan instructing Mr Arora to do anything about the other three categories.

[56] In response to Ms Winsborough's evidence Mr Ryan reiterated that he gave Mr Arora an express instruction to investigate and report on the other categories. He agreed that he did not set a timeframe for this but said that it was implicit that the timeframe was during the audit. He that once Ms Winsborough had suggested (on the call) that the figures for other stock lines might not be right, it followed that there was no way the audit could be completed without the other categories being sorted out too.

[57] He told the Authority that he had an overriding concern that Mr Arora did not appreciate the significance and seriousness of the issues. Had Mr Ryan signed the representation letter (knowing that additional provision might need to be made) he would have been providing a false declaration to the auditors.

[58] Mr Arora has subsequently raised one final issue in relation to the justification for his dismissal. After the disciplinary meeting in early 2007, he formally complained about what he saw as Mr Ryan's unfair treatment of him. He later formed the view that Mr Ryan targeted him, and dismissed him, in retaliation against the making of those complaints.

The decision to dismiss

[59] During the disciplinary process, Mr Ryan read out to Mr Arora Rule 2 of the New Zealand Institute of Chartered Accountants Code of Ethics which provides:

“A member must not make, prepare or certify, or permit or direct another person to make prepare or certify, any statement which the member knows, believes or ought to know to be false, incorrect or misleading, or open to misconstruction, by reason of the misstatement, omission or suppression of a material fact or otherwise.”

[60] Rule 28 of the same Code provides that:

“members in employment in dealing with their employer’s external auditors must not knowingly misrepresent facts or knowingly fail to disclose material facts.”

[61] Mr Ryan told the Authority that it was never alleged that Mukesh intentionally misled the auditors, but simply that it occurred. His evidence was:

“Had Mukesh been able to acknowledge the mistake and his responsibility for reporting the false information, we may have been able to move forward. I considered alternatives to dismissal, such as a warning, but in light of

Mukesh’s failure to acknowledge responsibility or even grasp what those responsibilities were, I could see no real alternative.”

[62] In short, Mr Ryan was not persuaded by Mr Arora’s explanations, nor by his representative’s assertion that these were at most performance issues rather than serious misconduct issues. After a short break in the third meeting Mr Ryan told Mr Arora that he was dismissed. The decision was confirmed in a letter dated 16 June 2008 which advised:

“We write to confirm the decision...to instantly terminate you employment on the grounds of serious misconduct...”

the Company finds that the allegation that you provided misleading and false information to the external auditor is true. The stock aging information provided to the Auditors on 29 April 2008 was substantially incorrect.”

Determination

The circumstances

[63] I begin by recording my findings of fact on the disputed aspects of the relevant circumstances.

[64] The first disputed matter was whether the figure provided to the auditors on April 29 was inaccurate to a material degree. This point was traversed at length during the Authority investigation, and again in submissions. For reasons of economy I do not set out here the detailed explanations of both methods but simply record that I am satisfied that the revised figure (arrived at with assistance from the auditors) was a better indication of the true level of aged stock than the April 29 figure. I also accept that given the total volume of stock carried by the respondent the discrepancy between the two figures was significant.

[65] Mr Ryan did not engage in an exhaustive comparison of the two approaches during the audit process or at any time prior to the dismissal. He relied on the second figure on the basis that it was prepared under the oversight of Mr Dick. I accept that it was reasonable for him to do so since Mr Dick is a very knowledgeable, skilled and senior member of his profession (witnesses for Mr Arora as well as those for the respondent attested to this.)

[66] The next disputed point is the question of what Mr Ryan told Mr Arora in the conference call of May 7. In relation to this issue I have been greatly assisted by the evidence of Ms Winsborough, whom I found a credible witness. I am satisfied that Mr Ryan did not give Mr Arora an express instruction to talk to the auditors about the possibility of discrepancies in other categories besides labels and tags.

[67] I also record that I do not consider it to have been self-evident that he should do so. Only shortly beforehand, the consensus among the respondent's managers had been that only one category of stock was at risk of containing significant amounts of aged and potentially obsolete stock. On the call Ms Winsborough raised the concern that there could be some aged stock in other categories but this did not become the

primary topic of the discussion which focussed rather on what was considered the greater and more pressing problem: proceeding to identify which stock within labels and tags was saleable.

[68] Finally Mr Arora has challenged the assertion that his role makes him responsible for errors in the inventory reporting. Having heard evidence from both Mr Ryan and Mr Arora about his job description and the structure of the company I accept that Mr Arora was second only to the managing director within Sato NZ, and that his role required him to take overall responsibility for accurate financial reporting. Throughout much of his employment he also had responsibility for Logistics and Information Technology. He therefore had, or should have had, some knowledge of matters such as warehouse practices which might impact on the accuracy of the accounts.

[69] It was not Mr Arora's job to say what was saleable or to work out the net realisable value of stock, but it was his job to make sure that the volume and age of stock were accurately reported. He must take a major share of the responsibility for the problems in the reporting of the respondent's inventory.

Poor performance or serious misconduct?

[70] The question now becomes what a fair and reasonable employer would have done in all these circumstances. The respondent's position is that the events surrounding the April 2007 audit destroyed any trust and confidence Mr Ryan, or his managers offshore, had in Mr Arora. Ms Douglas argued that in a case of this nature it is unhelpful to try and categorise conduct as being either strictly performance or misconduct, and in support of her argument she referred me to *Dearns v Eagle Technology Group Limited* [2002] 1 ERNZ 529 which dealt with the same issue and where the dismissal was found by the Employment Court to be justified.

[71] That case is of considerable factual similarity to this one in that it also concerned the summary dismissal of a Financial Controller after his failure to have company accounts ready for the auditors, thus delaying the completion of the audit. There is one key point of difference with this case however. In his written witness statement Mr Ryan specifically stated that the dismissal was not, at the time, based on

a conclusion that Mr Arora had deliberately misled him or the auditors. Mr Dearnis in contrast was found to have deliberately misled the respondent's board, having sought to extend the annual accounts deadline by telling the Board, incorrectly, that an external auditing team was unavailable before the deadline.

[72] Mr Ryan told the Authority that he has now come to doubt not just Mr Arora's competence and judgement but his integrity, and to suspect that Mr Arora underestimated the aged stock figure because his bonus entitlements could be affected if the company recorded a loss. The first point to be made in relation to this assertion is that a dismissal cannot be justified retrospectively on the basis of information which has emerged since (although regard may be had to such evidence in relation to remedies.) The second is that (in any event) there has not been shown to be a reasonable basis for a conclusion that Mr Arora deliberately misled Mr Ryan or the auditors. Mr Arora's continuing protestations that the April 29 figure was accurate were not reasonable but I am satisfied that they were genuine.

[73] I do accept, however, that there were serious shortcomings in Mr Arora's work. Issues relating to his general competence and professionalism will be addressed under the heading of contributory conduct below.

[74] The question to be determined now becomes whether, in the absence of intent to mislead, the shortcomings in Mr Arora's work were matters for summary dismissal rather than performance management. For this to be the case, those shortcomings must have been sufficiently grave as to be destructive of the necessary trust and confidence in Mr Arora.

[75] Dealing first with the issue of Mr Arora's failure to take action after the telephone conference of 7 May, I conclude that the factual findings recorded above effectively dispose of that. There was no express instruction to Mr Arora and the discussion was not such as to indicate, clearly and unequivocally, that the potential problem in the other stock categories was such as to impact on the accounts. Mr Arora failed to take the sort of initiative that Mr Ryan hoped to see in a senior manager but this cannot be characterised as serious misconduct.

[76] For the dismissal to be justified the inaccuracy in the April 29 figure must therefore be capable, without more, of amounting to serious misconduct.

[77] The provision of incomplete or inaccurate information to the auditors is certainly not a trivial matter. It indicates the persistence of the problems that led to the disciplinary meeting after the half year audit. Back in January, however, inaccuracies in the accounts were not treated as sufficiently serious to warrant even a warning. Mr Ryan was concerned about what he saw as Mr Arora's poor understanding of the Financial Controller's responsibilities yet following the disciplinary meeting he did not even see fit to provide written clarification of his expectations. I conclude that Mr Ryan failed at that time to give Mr Arora adequate feedback about what he had done wrong and what was required of him.

[78] Six months on and there had been no intervening disciplinary action or performance management. Then, even though the problem with the April 29 number was evident very soon after it was provided (indeed, Mr Ryan suspected it almost immediately) Mr Arora continued to be left in charge of liaising with the auditors. Disciplinary proceedings did not take place for several weeks after that. This is not consistent with the assertion that the provision of this figure led to a total loss of trust and confidence.

[79] When disciplinary proceedings did commence, the recurrence of the same type of problem that had beset the previous audit was suddenly elevated to serious misconduct. This is not the action of a fair and reasonable employer. I accept that the shortcomings in Mr Arora's handling of the matters related to the audit amounted to poor performance, which required management, but have not been satisfied that it amounted to serious misconduct. It follows that the problems did not justify summary dismissal. Mr Arora has made out his personal grievance.

(ii) Personal Grievance remedies

Contributory conduct and Reinstatement

[80] The trust and confidence between the parties has been further eroded by Mr Arora's evidence to the Authority. His complete refusal to acknowledge that

Deloitte's assessment of the aged stock was more reliable was particularly damaging. He also alarmed Mr Ryan by volunteering that that he had come to view certain company property (a phone) as his own and had claimed for its loss on a personal insurance policy.

[81] This evidence reflects adversely on Mr Arora's performance and judgement. I am satisfied that reinstatement is not practicable and for the same reason find that Mr Arora has significantly contributed to the situation that gave rise to his personal grievance. Remedies are therefore reduced by 40%.

Compensation for hurt and humiliation

[82] Mr Arora gave evidence of his shock at the dismissal and his deep distress at having his character impugned by the respondent's allegation of serious misconduct. He told me that his self esteem and ability to relate to family and friends have been seriously damaged by the dismissal and resulting long period of unemployment. I accept that the effects on him have been severe. In the absence of contributory conduct I would have considered an award of \$20,000.00 to be appropriate. After taking contribution into account this will be reduced to \$12,000.00.

Lost remuneration and benefits

[83] Mr Arora was on an annual salary of \$120,000.00 with bonuses (calculated in two parts based respectively on individual and organisational performance.) He also claims for:

- i. loss of car and petrol allowance (\$2,000.00 per month),
- ii. professional registrations (NZ and UK respectively \$750.00 and \$483.66 per annum)
- iii. broadband charges (\$49.95 per month)
- iv. health insurance (\$178.40 per month), and

- v. parking (\$300.00 per annum.)

[84] After the dismissal Mr Arora was unemployed for five months (from 13 June to 4 October) before getting a short term contract. Since then he has engaged in contract work the remuneration for which has fallen short of the salary and benefits he enjoyed with the respondent. Mr Arora is seeking lost remuneration and benefits for the entire period from his dismissal until the Authority's investigation.

[85] In response to these claims, the respondent submits that:

- i. Mr Arora did not make sufficient effort to mitigate his loss, having told the Authority that he turned down an offer of part-time work;
- ii. Mr Arora would not have been entitled to bonuses for the period post termination; none of the management team received performance bonuses for the period 1 April 2008 to 30 June 2009 due to the poor profitability of the company during that time;
- iii. only 25% of the car allowance may be claimed as a lost benefit; as the remainder was a non-taxable reimbursing payment for business expenses;
- iv. payment of professional registration fees was only made to enable Mr Arora to perform his duties;
- v. broadband and parking too were paid only to reimburse a business expense, and
- vi. Mr Arora's health insurance was paid up until August 2008.

[86] I do not accept that Mr Arora made insufficient efforts to mitigate his loss. He gave evidence of extensive job search efforts. However I do not accept that all the loss from the time of termination to the time of the Authority investigation arises out of the

personal grievance. Losses are awarded for the five month period before Mr Arora commenced contract work.

[87] The respondent's other submissions are accepted.

[88] Lost remuneration for the five month period before Mr Arora recommenced work is therefore calculated as follows:

Salary	\$50,000.00
Car and petrol allowance (at 25% for personal use)	\$2,500.00
Total	\$52, 500.00
Less 40% contribution	\$21,000.00
Taxable award	\$31,500.00 gross

Health insurance (August to November)	\$535.20
Less 40% contribution	\$214.08
Non-taxable award	\$321.12

(iii) Claim for arrears of wages

[89] Bonuses, as noted already, were to be paid to Mr Arora in two components, individual and organisational performance. The respondent says that for the year prior to Mr Arora's termination, as for the period after, no bonuses are payable because of poor performance both on Mr Arora's part and on the part of the organisation.

[90] This assertion is accepted. Mr Arora's claim in respect of unpaid bonuses for the period leading up to his termination fails. No award is made in respect of the claim for arrears of wages.

(iv) Summary of remedies

[91] **The respondent, Sato NZ, is ordered to pay to Mr Arora the following sums:**

- i. \$12,000.00 compensation for hurt and humiliation;**
- ii. \$31,500.00 gross for lost remuneration, and**
- iii. \$321.12 in respect of health insurance premiums.**

Costs

[92] This issue is reserved. In the event that the parties cannot resolve this issue between themselves, the parties have a period of 28 days in which to make application for costs, accompanied by submissions.

Yvonne Oldfield

Member of the Employment Relations Authority