

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 386/07  
5086092**

BETWEEN ASHLYN BOSCO BRAGANZA  
Applicant  
AND BRAND DEVELOPERS LIMITED  
Respondent

Member of Authority: Leon Robinson  
Representatives: Tony Kurta for Applicant  
Keith McConnell for Respondent  
Investigation Meeting: 4 December 2007  
Determination: 6 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Mr Ashlyn Bosco Braganza (Mr Braganza) says he was unjustifiably dismissed. The respondent Brand Developers Limited (Brand Developers) says the dismissal was justifiable. Mr Braganza seeks reimbursement, compensation and a penalty. Although not initially sought, at the investigation meeting he amended his claim with leave to also seek reinstatement.

[2] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[3] Mr Braganza commenced employment with Brand Developers in August 2004. He was employed part-time as a call centre/customer care representative and worked Saturday mornings from 6.00am until 12.00pm midday.

[4] The terms of Mr Braganza's employment were recorded in a written individual employment agreement signed by Mr Braganza on 23 October 2004. Although the copy produced to the Authority is not signed by Brand Developers, both parties accept the document recorded the agreed terms of the relationship.

[5] On Saturday 24 February 2004 Mr Meier called staff including Mr Braganza to a meeting and castigated them in relation to customer calls not being returned. Mr Meier used very bad language in his address to the staff and he accepts it was unprofessional of him to have done so. At the conclusion of his address, he directed staff back to work.

[6] On the morning of Monday 26 February 2007 Mr Meier instructed call centre manager Ms Edna Williams (Ms Williams) to inform Mr Braganza that he would not be required.

[7] Ms Williams telephoned Mr Braganza at his full-time employment and told Mr Braganza he was dismissed. Mr Braganza enquired as to the reasons for his dismissal. Ms Williams told him at Mr Meier's instruction.

[8] Mr Braganza wrote by email to Brand Developers' managing director Mr Paul Meier (Mr Meier) shortly after being advised of his termination at 10.47 am as follows:-

*Hi Paul*

*I just got a call from Edna with regards to my termination which is rather unfortunate as it was with great dedication we made it to the TV Shop every Saturday morning at 6.00 am for the last three years. It was a rather ugly way to end this long journey.*

*I would like to thank you and Wendy for all your support during my tenure with the Company and good luck in all your future endeavours.*

*Regards*

*Ashlyn Braganza*

[9] There followed correspondence by email between Mr Braganza, Ms Williams and team leader Ms Kumuda Gopalachari suggesting various reasons for Mr Braganza's' summary termination.

[10] Mr Braganza's representative raised a personal grievance with Brand Developers by letter dated 18 March 2007.

[11] Mr Meier responded for Brand Developers by letter dated 5 April 2007. He wrote:-

*In response to your letter received late March 2007, we would like to respond as follows:*

*Firstly, for the record, his main reason for dismissal was the dishonesty that was displayed in not entering the correct information on our Call Centre Manager system. All staff were advised of this circumstance when this system was implemented and that this behaviour would not be tolerated. He inflated his statistics to make it seem as though he had placed more orders than he actually had, to make it look as though he was performing better than he actually was. This was related to him in an email, if so required your client can avail this information to you and you may request that he try and justify why there is a variance between the actual orders taken and what he projected on the system.*

*The matter of the casual attitude is what was discussed in the training room with all the staff that was rostered on that day. They collectively decided not to answer the calls that were on the system and place orders, hence causing the company to lose sales. Ashlyn particularly, sat with his feet on the desk in front of me basically not doing anything when I addressed him. As you are aware, this kind of attitude is what causes companies to close their doors.*

*We feel totally justified in our actions.*

*We await your further decision in this matter.*

*Yours  
Paul Meier*

## **The merits**

[12] The Authority determines the employment relationship problem by having regard to the substantial merits of the parties' respective positions. The Authority applies the statutory test of justification set out at section 103A of the *Employment Relations Act 2000* (the Act) which provides:-

### *103A Test of justification*

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were*

*what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[13] The test requires that an employer's actions are to be objectively determined by considering whether they were what a fair and reasonable employer would have done in all the circumstances at the time of dismissal. Each stage of the employer's actions is to be considered including the procedure leading to the employer's finding of serious misconduct and its decision to dismiss.

[14] The procedure which led to the finding of serious misconduct must have been in accordance with justice and fairness and the decision to dismiss must be one which a fair and reasonable employer would have taken in all the circumstances relating to both the employer and the employee.

[15] A balanced assessment of both procedure and substance is required.

[16] Mr Braganza was dismissed summarily over the telephone and there is no dispute about that. There was no process whatsoever which preceded the termination and I have no hesitation in finding that was unfair to Mr Braganza and unjustifiable. This complete absence of any kind of process of investigation or enquiry does not persuade me that Brand Developers were justified in reaching a conclusion that Mr Braganza had engaged in conduct so serious that his immediate termination was required.

[17] As for the substantive reasons for the dismissal, there are said to be three grounds. Firstly what is said to be the main reason, that Mr Braganza was dishonest in not entering the correct information on the Call Centre Manager system. This is explained that Mr Braganza inflated his statistics to make it seem as though he had placed more orders than he actually had, to make it look as though he was performing better than he actually was. Next it is said he had a casual attitude for which he and other staff were castigated for on the morning of 24 February 2007. Finally Brand Developers refers to Mr Braganza particularly sitting with his feet on the desk in front of Mr Meier and Mr Braganza's inaction when Mr Meier addressed him.

[18] The final two matters could not in my view constitute conduct which would justify summary dismissal.

[19] As for the contended "main" reason that Mr Braganza was dishonest by inflating his statistics to make it seem as though he had placed more orders than he actually had, I am not satisfied that Brand Developers had the evidence to substantiate this conclusion. What it produces to the Authority of this conclusion is not persuasive. It is inconsistent and not credible. In addition, Brand Developers did not raise the matter by way of any process of investigation or enquiry with Mr Braganza for his input.

[20] I conclude by finding that Brand Developers' actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances.

### The determination

[21] **I find that Mr Braganza was unjustifiably dismissed. He has a personal grievance and is entitled to remedies in settlement of that grievance.**

### The resolution

[22] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Braganza's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am not persuaded of any blameworthy conduct on Mr Braganza's part and therefore I find he did not contribute to the situation that led to the personal grievance I have found.

### *Reimbursement*

[23] Mr Braganza has not found other work on Saturdays. He claims reimbursement of gross \$6,480.00 being thirty-six days for each Saturday since his termination.

[24] But Mr Braganza does not persuade me that he has taken sufficient steps to mitigate his losses. He says he continued to check the newspapers and made

approaches to various recruitment agencies for other Saturday work but no such work was available. He cannot give evidence of any particular application for similar work. I therefore decline to award him his claimed actual loss but instead, award him three months lost wages being 12 weeks @ \$185.00 per week in the total gross sum of \$2,220.00. **I order Brand Developers Limited to pay to Mr Ashlyn Braganza the gross sum of \$2,220.00 as reimbursement.**

### ***Compensation***

[25] Mr Braganza gives evidence that he was devastated when he was dismissed over the phone without any discussion with him. He refers to the email correspondence immediately after his dismissal and says he was upset. He says the dismissal shook his confidence and he was concerned about what his work mates would think. He was concerned for his credibility as a good and longstanding employee. I am satisfied that Mr Braganza has suffered loss of dignity, hurt and humiliation and injury to his feelings. Having regard to his evidence, his length of service and the nature of the personal grievance I award him compensation of \$3,000.00. **I order Brand Developers Limited to pay to Mr Ashlyn Braganza the sum of \$3,000.00 as compensation.**

### ***Penalty***

[26] Mr Braganza claims a penalty of \$3,000.00 against Brand Developers alleging it failing to act in good faith by its refusal to attend mediation having agreed to do so. Mr Meier indicated the respondent would attend mediation in April 2007. He tells the Authority that when he enquired of the mediation service he was informed that the respondent's attendance or non-attendance at mediation was inconsequential. The respondent did not attend initially but did however attend subsequently. In those particular circumstances, **I decline to impose a penalty as sought.**

### ***Reinstatement***

[27] Reinstatement was not formally sought in the statement of problem. It has however been a topic of discussion between the parties. Mr Kurta for Mr Braganza advised the Authority at the investigation meeting that Mr Braganza sought reinstatement. I immediately made enquiries as to whether there would be any

prejudice to the respondent for that remedy being formally claimed at such a late point. Mr McConnell addressed the matter and declined my invitation that the matter adjourn for the respondent to address the issue. He also addressed the issue in his prepared submissions. I discern no prejudice for the respondent and so I determine the issue now.

[28] I am not persuaded that there is any impracticability which would preclude reinstatement. Mr McConnell argues that there has been a significant period of time elapsed since the dismissal and the relationship of confidence of trust is now non-existent. I am unable to attribute any fault on Mr Braganza's part establishing delay but in any event I do not consider that such a statutory remedy requires consideration involving maxims and principles of equity as an interim reinstatement application imports. Notwithstanding the passage of time, I discern no impracticability to reinstatement.

[29] Reinstatement is under the legislation the primary remedy available to a grievant that succeeds in obtaining a determination of unjustifiable dismissal in their favour. That is what Mr Braganza is now entitled to. I also consider the denial of such an order to Mr Braganza would be to licence unlawful termination. For these reasons, **I order that Brand Developers Limited reinstate Ashlyn Braganza to his employment as call centre/customer care representative immediately.**

## Costs

[30] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Kurta is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr McConnell is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson  
**Member of Employment Relations Authority**