

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 39  
3034971

BETWEEN                      WALTER COOPER  
Applicant

A N D                              HQR LIMITED  
Respondent

Member of Authority:      T G Tetitaha

Representatives:            M Kadarmia / W Cooper for the Applicant  
B Watson / C Taylor for the Respondent

Investigation Meeting:      23 January 2019 at Auckland

Submissions:                 23 January 2019 from both parties

Record of Oral  
Determination:                30 January 2019

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. Walter Cooper was unjustifiably dismissed by HQR Limited.**
- B. I order HQR Limited to pay Walter Cooper the sum of \$1,154 lost remuneration within 28 days of this determination.**
- C. I order HQR Limited to pay Walter Cooper the sum of \$5,000 compensation within 28 days of this determination.**
- D. I order HQR Limited to pay Walter Cooper the sum of \$2,000 towards his costs within 28 days of this determination.**

**Employment Relationship Problem**

[1]     Walter Cooper alleges he was unjustifiably dismissed by HQR Limited. He also alleges HQR breached clause 7.2 of his employment agreement and owes him

commission. HQR denies it unjustifiably dismissed him or owes him any commission.

[2] At the start of the hearing the parties confirmed Mr Cooper's commission was paid in full on 9 May 2018. The only remaining issue is about expenses he is claiming for transporting employees around Auckland. The parties are exchanging information to resolve this matter. It is agreed there is no need for the Authority to investigate this matter any further.

### **Relevant Facts**

[3] Mr Cooper was employed as a Transport Recruitment Consultant. His role required he find and place truck drivers with various client companies. He was paid a salary of \$60,000 plus commission.

[4] He signed an employment agreement. This set out payment of his commission on a quarterly basis. Commission was payable at the discretion of the Director and "can be compromised by serious misconduct."

[5] Mr Cooper's first 2018 commission was due for payment at the end of April. He requested payment in advance of the due date but this was refused.

[6] On 30 April he received an email from his supervisor Rochelle Mitchell-King stating no commission was payable because he had not reached his sales target of \$65,000. Mr Cooper replied stating his belief was that his sales target was \$60,000 and he had achieved sales of \$62,000. Therefore commission was payable

[7] Mr Cooper believed this evidenced unfair changes to his commission structure. He raised his concerns about the commission in weekly staff meetings. The General Manager (GM) was unhappy with his aggressive behaviour but did not raise any complaints at the time with Mr Cooper.

[8] Ms Mitchell-King then advised the commission was to be paid but HQR would do so at a later date.

[9] However on 8 May 2018 at 5.31 pm Ms Mitchell-King advised the commission would be paid but \$1,216.74 withheld due to the non-payment by the client of their invoiced services. Mr Cooper was again unhappy with this response.

### **Email threats**

[10] On 8 May 2018 at 6.31 pm Mr Cooper sent an email that criticised the GM including reference to previous business dealings. He believed she was responsible for the non-recovery of the client debt. He then made threats to hurt the company's brand and report the treatment of their migrant workers to Immigration Services.

[11] Following receipt of the email, Mr Cooper's cellphone, email and mobile access was suspended.

### **Suspension & falsifying documentation**

[12] Mr Cooper was asked to attend a meeting with Bas Watson, HQR Director and Courtney Taylor, an external HR Consultant on 10 May 2018. The same day he was suspended from work. He was also handed a letter seeking a disciplinary meeting. It was alleged he made threats against HQR, challenged the appointment and competency of the GM and breached confidentiality.

[13] On 12 May 2018 HQR raised a further concern about false claims for work he had not undertaken; misrepresentation of his 'activity' through PRS, an internal database record of salespersons activity; and had interviewed for employment with a competitor. These allegations were to be dealt with at a second disciplinary meeting.

### **First Disciplinary meeting**

[14] On 14 May 2018 Mr Cooper met with Mr Taylor in person relating to the allegations made on 12 May. Mr Watson and the GM also attended by telephone. There is a dispute about who was the decision maker. Mr Cooper believed it was Mr Taylor. HQR alleged it was Mr Watson and the GM assisted by Mr Taylor.

[15] Unbeknown to Mr Cooper at the time, the GM had also raised concerns with Mr Watson about her safety. The threats were viewed as an escalation of Mr Cooper's aggressive behaviour at meetings.

[16] Mr Watson also believed Mr Cooper had a criminal conviction for violence. This was not disclosed to Mr Cooper until hearing. Mr Cooper provided evidence at hearing from the New Zealand Police confirming that he had no criminal convictions at all.

[17] Mr Taylor produced a set of Minutes and a summary of the meeting by way of email dated 16 May 2018. There was a dispute whether Mr Cooper had received any or all of these documents especially the Minutes. Both documents were provided to Mr Watson and the GM.

[18] The Minutes referred to allegations of blackmail, referred to him being told by HQR he had “a green light to go and no one was holding a gun to his head saying that he needed to work there” and that he was “unscrupulous and vindictive” and a “blatant liar”.

[19] The Minutes also referred to Mr Cooper wanting to seek legal advice, being told he could do so but giving no further opportunity for this to occur.

### **Second Disciplinary Meeting**

[20] On 17 May 2018 Mr Cooper attended a second meeting with Mr Watson and Mr Taylor relating to the allegations made on 12 May. There is a dispute whether he was handed two documents at the meeting showing his entries in the internal record system or not giving rise to the allegations of falsification or not.

[21] A typed summary of the meeting was handed to Mr Cooper at the end of the meeting. It noted Mr Cooper denied any intent to make a false claim or misrepresent HQR and had recorded meeting with another recruiter “to discuss potential provision of services by HQR”. He also admitted that while there he made an enquiry about the class 4 truck driving job.

[22] HQR rejected his explanation stating they “were struggling to establish any integrity, sincerity or believability with your reasons”. Further it believed he had disclosed confidential information about HQR’s rates to another recruitment agency. This was based on the entry in system that the recruiter had “asked about the rates”.

[23] Mr Watson accepted he did not contact the recruiter to confirm Mr Cooper's explanation or that they had been given HQR's rates. At hearing Mr Cooper confirmed the recruiter had asked for their rates but denied he had given that information.

[24] On 18 May 2018 Mr Cooper was dismissed.

[25] Mr Cooper raised a personal grievance on 28 July 2018 for unjustified dismissal and wage arrears. A statement of problem was filed on 21 August 2018.

### **Issues**

[26] There is now only one issue for determination: namely, was Mr Cooper unjustifiably dismissed by HQR Limited?

[27] Once it is accepted employment was terminated, the evidential burden falls upon the employer to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2) Employment Relations Act 2000).

[28] This requires a two stage enquiry. Firstly whether there was serious misconduct? If so, then whether the process the employer followed was fair and reasonable?

[29] Serious misconduct "... will generally involve deliberate action inimicable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty."<sup>1</sup> It is conduct which "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."<sup>2</sup>

[30] When examining the process leading to dismissal, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the

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<sup>1</sup> *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

<sup>2</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[31] The Authority must not determine there is an unjustified dismissal because of defects in the process that were minor and did not result in an employee being treated unfairly.<sup>3</sup>

### **Was there serious misconduct?**

[32] HQR alleges Mr Cooper threatened to report HQR to Immigration for employing illegal workers and recorded a job interview as a client meeting in his work diary. It further alleged he had applied for a position with a competitor under the guise of offering them recruitment services and falsely reported this to HQR.

[33] Mr Cooper's records that he had attended a meeting with a competitor were not false. His evidence that he asked if the recruiter was interested in subcontracting to HQR for driver services cannot be discounted because HQR did not make any further enquiries. Similarly HQR cannot reasonably conclude Mr Cooper had given their rates to a competitor because he denied this had occurred and they made no further enquiries. His enquiry about a job they had advertised does not support HQR's conclusion he had falsified records. There was insufficient evidence before HQR to conclude this was serious misconduct.

[34] Threats to damage an employer's reputation fall within the definition of serious misconduct within the employment agreement (see clause 13.3). The threats were evidenced in the 8 May email to Ms Mitchell-King. His explanation that he had no evidence to show any truth to these threats only other employees complaints would not have allayed a reasonable employers views about the serious nature of the threats. Further he appeared to lack any remorse or insight into the effects of his threats. This would have been destructive of HQR's trust and confidence in Mr Cooper to act in its interests.

[35] There was evidence of serious misconduct that could have resulted in Mr Cooper's dismissal.

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<sup>3</sup> Section 103A(5) Employment Relations Act 2000.

**Was the process leading to dismissal fair and reasonable?*****Were HQR's concerns raised with Mr Cooper?***

[36] I am not persuaded HQR properly raised its concerns. This is because its conclusions of serious misconduct were bound up with more serious concerns that were never raised with Mr Cooper for comment prior to dismissal. These included:

- His alleged criminal background;
- HQR's belief Mr Cooper's actions were not just threatening behaviour but criminal behaviour e.g. blackmail;
- HQR's belief there had been a breach of confidential information because a competitor had asked for rates inferring these had been given to them;
- The GM's fears Mr Cooper's behaviour was escalating and it was unsafe to reinstate him to the workplace.

[37] All of the above defects were not minor and were unfair to Mr Cooper. These were concerns that made the alleged misconduct more serious and his return to the workplace more difficult. It was unfair not to allow Mr Cooper an opportunity to address (and correct) these concerns. It would have impacted upon the outcome.

***Was Mr Cooper given an opportunity to be heard?***

[38] The disciplinary meetings were organised relatively quickly. Mr Watson was working under the mistaken impression that there was a legal requirement the meeting be held within 24-48 hours.

[39] The issues were raised with Mr Cooper on Thursday 10 May 2018. He was given one working day to find legal advice and/or a support person. The 14 May Minutes and an email dated 16 May 2018 record Mr Cooper stating that he wished to seek legal advice. Despite raising this concern, no opportunity for him to take legal advice was given.

[40] There was also a lack of clarity around who was the decision maker. Mr Cooper initially believed it was Mr Taylor. Mr Watson stated he was the decision

maker but used both Mr Taylor and the GM to reach his decision. The correspondence refers to “we” without specifying who is making the decision. Mr Cooper’s confusion about the decision maker has merit.

[41] Even if the decision maker was Mr Watson and/or the GM, neither attended the first disciplinary meeting in person. Given Mr Cooper’s credibility was being questioned, it was inappropriate to not allow him make direct representations to Mr Watson and/or the GM personally.

[42] The 14 May Minutes also show substantial partiality by Mr Taylor. Mr Watson cannot have reasonably formed the same views without meeting Mr Cooper in person to hear and see his explanations. Participating by way of telephone does not provide a fair and reasonable basis for reaching the same beliefs about Mr Cooper’s general character.

[43] The 14 May Minutes were not given to Mr Cooper prior to dismissal. They were before the decision maker Mr Watson prior to dismissal. This was a substantial defect and unfair given Mr Watson never met with Mr Cooper.

***Did HQR Ltd genuinely consider his responses?***

[44] There is evidence HQR had made up its mind about Mr Coopers continued employment as early as 14 May 2018. The 14 May Minutes evidence comments made at the meeting inviting Mr Cooper to resign or, by implication, face dismissal.

[45] All of the above failures show HQR did not genuinely consider Mr Cooper’s explanations, especially given the failure to raise more serious concerns that would have affected the outcome of the process.

[46] The above defects were not minor and did cause unfairness to Mr Cooper. Therefore Walter Cooper was unjustifiably dismissed by HQR Limited.

**Remedies**

[47] Mr Cooper has a personal grievance and is entitled to remedies of lost remuneration and compensation for hurt and humiliation.

[48] In terms of lost remuneration, he found alternative employment quickly. Therefore he has mitigated his losses. He did suffer two weeks of lost wages. He is entitled to recover that lost remuneration of \$2,308 subject to any reduction due to contributory behaviour.

[49] In terms of compensation his evidence of hurt and humiliation was at the lower end of the spectrum of cases starting at \$10,000.

[50] Given the finding of serious misconduct due to the threatening email, a reduction in the remedies is appropriate. This reduction shall be 50%.

[51] I order HQR Limited to pay Walter Cooper the sum of \$1,154 lost remuneration within 28 days of this determination.

[52] I order HQR Limited to pay Walter Cooper the sum of \$5,000 compensation within 28 days of this determination.

**Costs**

[53] Having heard from the parties on costs, I have resolved to award less than the daily tariff amount of \$4,500. This is because one of the issues for hearing about compensation had been resolved prior to the statement of problem being filed and should not have been brought to the Authority. Further the parties representatives took little participation in the hearing with most of the examination being undertaken by the Member.

[54] As indicated to the parties I order HQR Limited to pay Walter Cooper the sum of \$2,000 towards his costs within 28 days of this determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**