IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 188
5463546

	BETWEEN	HAROLD DILLON Applicant
	A N D	LOGICAL SYSTEMS LIMITED Trading As YOOBEE Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person Bryce Beattie for the Respondent, save for at the investigation meeting
Investigation Meeting:	18 November 2014 at Christchurch
Date of Determination:	19 November 2014

DETERMINATION OF THE AUTHORITY

The Applicant was unjustifiably dismissed and is awarded the remedies set out in this determination.

Employment relationship problem

[1] Mr Dillon claims that he was unjustifiably dismissed by the respondent with effect from 2 June 2014. The respondent's position is that Mr Dillon was dismissed for redundancy due to the company restructuring the sales team.

Non-appearance of respondent at the investigation meeting

[2] The respondent has been represented by Mr Bryce Beattie throughout the proceedings. Mr Dillon was self-represented and was present in New Zealand at the time that he lodged his personal grievance with the Authority but had to leave the

country on 1 October 2014 when his work visa expired. The Authority initially had some trouble getting Mr Beattie to commit to a date for the initial telephone conference call, although this eventually occurred on 12 August 2014.

[3] Although Mr Dillon had to leave New Zealand on 1 October 2014 and wished for the investigation meeting to occur prior to this event, the Authority accommodated a request from the respondent for the investigation meeting to be held after this date, on the basis that Mr Beattie was essentially unavailable during September. He told the Authority that only he would be giving evidence on behalf of the respondent. The investigation meeting was, accordingly, set down for Friday 17 October 2014 and arrangements were made for Mr Dillon, who by now had left New Zealand, to give his evidence via Skype.

[4] Directions were issued by the Authority which included a direction that Mr Beattie was to lodge and serve the respondent's statements of evidence by no later than 4pm on Friday 19 September 2014.

[5] On 9 October 2014 Mr Beattie contacted the Authority to say that he was required to be in Sydney on 17 October and that the investigation meeting needed to be rescheduled. Despite objections from Mr Dillon, the Authority agreed to reschedule the investigation meeting for Tuesday 18 November. However, due to concern at the delays that had been occurring hitherto in investigating Mr Dillon's application, the Authority sent a Minute to the parties stating the following:

> *Whilst I am willing to accommodate the respondent on this occasion, I will not be willing to do so again. Therefore, travel overseas, or any other business engagement of any kind will not take priority over the Authority's investigation. The investigation on 18 November 2014 will be vacated only on the most exceptional circumstances and only after sufficient proof has been furnished. If necessary, it will proceed without the presence of Mr Beattie or any other representative of the respondent.*

[6] I also made clear in my Member's Minute that a failure by the respondent to produce a written brief of evidence by Monday 10 November 2014 at the latest would be noted in the determination of the Authority and that the investigation would proceed whether or not the respondent produced a brief of evidence.

[7] On the evening of 17 November 2014, at 10.37 pm, the Authority's office received an email from Mr Beattie stating that he had been due to fly back to

Christchurch from Auckland at 8pm that evening but had missed his flight. A separate email received on the same evening at 11.02 pm advised the Authority that Mr Beattie had been booked on a new flight departing Auckland at 13.00 hours. These emails did not come to the attention of the Authority until around 08.50 am on 18 November.

[8] No explanation was given by Mr Beattie in his emails as to the reason for him missing his flight and he did not indicate when he would next be in a position to attend the Authority's investigation meeting. He also did not suggest that he could take part in the Investigation Meeting remotely, and gave no indication of his intended whereabouts at 09.30am, the start time of the Investigation Meeting.

[9] In addition, by the morning of 18 November, neither Mr Dillon nor the Authority had received the statements of evidence of the respondent despite Mr Beattie purporting to have sent a copy to the Authority on or around 10 November 2014. These statements have still not been received at the time of finalising this determination. No explanation has ever been furnished by the respondent for failing to comply with the Authority's direction in respect of the service and lodgement of its statements of evidence.

[10] The Authority does not lightly decide to proceed with an investigation meeting in the absence of a party. However, in this particular case, the respondent has displayed both a persistent proclivity to delay the Authority's investigation meeting and a lack of respect for the Authority's directions. Mr Dillon now resides overseas and can only take part in the Authority's investigation meeting by way of Skype, which, in turn, requires him to accommodate a significant time difference between New Zealand and the United States, where he resides. As it was, on the day of the Authority's investigation meeting, Mr Dillon was in China and took part in the investigation meeting at 4am his time.

[11] In deciding to proceed with the investigation meeting in the absence of Mr Beattie, I took into account the prejudice that would accrue to Mr Dillon if the investigation meeting was postponed yet again. I also took into account the fact that the respondent had been given ample opportunity to take part in the Authority's proceedings in good faith but, in my view, had failed to do so. Accordingly, the investigation meeting proceeded without Mr Beattie.

Brief account of the events leading to the dismissal

[12] The respondent owns and operates a retail business selling, primarily, Apple products, trading under the name Yoobee. It has two retail outlets in Christchurch. Mr Dillon was employed as a sale consultant selling various Apple and third party products to customers.

[13] Mr Dillon says that, on 2 May 2014, he was called into a meeting with Mr Beattie (the manager of the respondent's Riccarton Road branch) and with a Mr Ben Gillett who, it is understood, managed the Blenheim Road branch. Mr Dillon says that he was told that he was no longer going to be with the company and that his final day as an employee was to be 2 June 2014. He says he was told that the decision had been made during a manager's meeting in Auckland and that the new owner of the business, Mr Daven Naidu, had told Mr Beattie and Mr Gillett to fire Mr Dillon.

[14] Mr Dillon says that, when he asked what the reasons for his firing were, they were not able to tell him, although Mr Gillett told Mr Dillon that Mr Naidu was the new owner and that whatever he said goes.

[15] Mr Dillon's evidence is that, around two weeks later, he asked what he was to say to Immigration New Zealand about his dismissal and he was told by Mr Gillett that he was to say that he was dismissed due to company restructuring. This was the first time that the term had been used, Mr Dillon says. Mr Dillon produced to the Authority an audio recording of this conversation with Mr Gillett, which confirms his evidence. A transcript prepared by Mr Dillon of this conversation includes the following dialogue, which is reflected by the audio recording heard by the Authority:

> *Harold Dillon: What do I tell them if they ask why I got fired:*
>
> *Ben Gillett: … [inaudible] … [laughter] … ummmm, yeah, yeah I guess restructuring … re … yeah I guess restructuring …*

[16] It is Mr Dillon's evidence that he had been given no warning prior to the meeting on 2 May 2014 that there was a possibility of his dismissal for redundancy and he had been given no documentation or other information supporting the company's purported need to make his position redundant. He had also not been told that he could have a support person with him at the meeting of 2 May 2014.

[17] Mr Dillon's evidence was that he was also told on 2 May 2014 that no other employees would be hired for sales positions but that a recently hired sales consultant would take a new role, called *Lead Sales Manager*. It is Mr Dillon's evidence that he had the sales experience to carry out this role.

[18] Mr Dillon says that he was later told that the only available position from then on would be that of *Communications Specialist* but that, although Mr Dillon's background and university diploma is focused on communications, he was never offered that position.

[19] Mr Dillon also states that shortly before he left the employment of the company on 2 June 2014 two additional employees were hired as sales consultants, rather than to the position of Communications Specialist.

[20] In the respondent's statement in reply, the respondent states that Mr Dillon's position was made redundant due to the company restructuring the sales team. It also states that alternative positions were discussed *pending on [Mr Dillon's] visa variation.* He states that Mr Dillon declined all positions discussed with him.

[21] The company also states in its statement in reply that Mr Dillon was employed from 6 March 2014, that his visa conditions with Immigration New Zealand were not highlighted to the company and he was in breach of his immigration working visa. It states that, *as soon as the company found out that the visa variation was not complete it was apparent that Harold was an illegal employee.*

[22] In light of this statement from the respondent, Mr Dillon produced for the Authority a copy of his work visa issued under the New Zealand Immigration Act 2009. This showed that the visa commenced on 10 September 2013, was valid until 1 October 2014 and that it allowed Mr Dillon to work for any employer in any occupation in New Zealand.

[23] This evidence essentially contradicts the assertions made by the respondent in its statement in reply, as it would appear that this visa would have allowed Mr Dillon to have undertaken any role within the respondent company. Certainly, it does not indicate that he was *an illegal employee* as asserted by the respondent.

Determination

[24] Section 4 of the Employment Relations Act 2000 (the Act) provides as follows:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
> *(1A) The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*
> *(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.*
> *(1C) For the purpose of subsection (1B),* **good reason** *includes—*
> *(a) complying with statutory requirements to maintain confidentiality:*
> *(b) protecting the privacy of natural persons:*
> *(c) protecting the commercial position of an employer from being unreasonably prejudiced.*

[25] Section 103A of the Act sets out the test of justification that the Authority must apply when deciding whether a dismissal was justified in law or not. Section 103A states as follows:

> ***Section 103A Test of justification***
>
> *(1) 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 applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
> *(3) In applying the test in subsection (2), the Authority or the court must consider—*

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
(a) minor; and
(b) did not result in the employee being treated unfairly.

[26] It is absolutely clear on the face of Mr Dillon's evidence, which I have no reason to doubt, that the respondent failed in almost every conceivable respect to follow a fair procedure in relation to Mr Dillon's dismissal on the grounds of redundancy. Furthermore, given Mr Dillon's evidence of other sales consultants having been recruited after he had been told that he was being dismissed, it is more likely than not that the respondent's purported reason for dismissal, redundancy, was incorrect.

[27] Therefore, in light of this, I find that Mr Dillon's dismissal was both procedurally and substantially unjustified, as the respondent's actions and the way the respondent acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Remedies

[28] Section 123(1)(b) and (c) of the Act provides as follows:

123 Remedies
(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
……
(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
(c) the payment to the employee of compensation by the employee's employer, including compensation for—

> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[29] Section 128 provides as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[30] Mr Dillon was employed to work 40 hours per week at a basic pay of $15 per hour. That produces gross weekly earnings of $600. He was also entitled to commissions on sales that he made. Unfortunately, the respondent has produced no information in relation to the commissions that Mr Dillon earned, nor the basis on which they were payable, and Mr Dillon did not have access to this information after his employment ended. Mr Dillon has, however, produced copies of his bank statements which showed his fortnightly net earnings over the preceding 30 weeks of his employment. This information showed that his net earnings fluctuated, but averaged $1,064 per fortnight after deductions, or $532 per week, or $106.40 per working day.

[31] Mr Dillon's evidence to the Authority was that, after 2 June 2014, the last day of his employment, until 1 October 2014, when he had to leave New Zealand, he only earned a gross income of $2,013.93 (a net of $1,699.30) through TradeStaff Group.

[32] Mr Dillon also gave evidence that, due a shoulder injury incurred while working for the respondent, he was unable to continue to temp for TradeStaff but that he was unable to find retail work more suited to his injury. I am satisfied that Mr Dillon took adequate steps to seek work after his dismissal and therefore adequately attempted to mitigate his loss.

[33] I am also satisfied that, given that Mr Dillon would have left New Zealand on 1 October 2014 in any event, it is highly unlikely that he would have voluntarily left the employment of the respondent prior to that date. There is no evidence that his performance was under question, and so I also find that it is unlikely that Mr Dillon would have been dismissed for a legitimate reason before this date. I am therefore prepared to exercise my discretion under s.128(3) of the Act and award a sum greater than that to which an order under sub-section (2) would otherwise be made; namely, I am prepared to award Mr Dillon lost remuneration for the period of 3 June to 30 September, less the earnings he made through TradeStaff. This period amounts to 86 working days. Averaging a net income, including commissions earned, of $106.40 a working day, this amounts to a potential maximum average loss of $9,150.40 net, less $1,699.30 net earned with TradeStaff, which amounts to a total average loss of $7,451.10.

[34] Turning to the issue of compensation for Mr Dillon in relation to humiliation, loss of dignity and injury to his feelings arising out of the unjustified dismissal, Mr Dillon gave evidence that he suffered considerable stress as a result of having been unjustifiably dismissed. He said that, because of the uncertainty of his ability to acquire a suitable job that would sustain him, he had trouble sleeping and became withdrawn and frequently depressed. He said that his relationship with others and his partner suffered significantly, largely due to the fact that he often felt stressed. He said that in turn added to his having issues with anxiety. Mr Dillon presented evidence that he had seen a doctor and been prescribed medication to help him with anxiety.

[35] I am satisfied from this evidence that Mr Dillon did suffer reasonably significant humiliation, loss of dignity and injury to his feelings as a result of being dismissed in the way that the dismissal was effected. Although Mr Dillon did not bring a claim of race discrimination before the Authority, he did say that he wondered whether he had been chosen for dismissal because of his race (Mr Dillon is of African American heritage).

[36] I do also need to take into account, however, the fact that the duration of Mr Dillon's work with the respondent was limited by the terms of his visa, and that the unjustified loss of a short term job is likely to be of lesser effect than that of a job in which one hoped to forge a long term career.

[37] Taking into account all of this evidence, I believe that an award of $5,000 pursuant to s.123(1)(c)(i) of the Act is appropriate.

Contribution

[38] Pursuant to s.124 of the Act, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[39] Even on the respondent's own case, that Mr Dillon was dismissed by reason of restructuring, there was no blameworthy conduct by Mr Dillon that contributed to his personal grievance. Therefore, it is not appropriate to reduce the remedies awarded in this determination.

Orders

[40] I order the respondent to pay to Mr Dillon the following sums:

a. The net sum, after deduction of appropriate taxes, and other levies, of $7,451.10, pursuant to s123(1)(b) of the Act; and

b. The further sum of $5,000 pursuant to s123(1)(c)(i) of the Act.

Costs

[41] Mr Dillon represented himself through the process and therefore has incurred no legal costs. However, he has incurred the Authority's lodgement fee of $71.56 and it is appropriate for this sum to be reimbursed to Mr Dillon by the respondent.

David Appleton
Member of the Employment Relations Authority