

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Darryl George Eustace (Applicant)
AND Telecom Directories Limited (Respondent)
REPRESENTATIVES Alastair Logan, Counsel for Applicant
Samantha Turner, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INTERVIEW MEETING 20 March 2006
ADDITIONAL SUBMISSIONS RECEIVED 21 June 2006 from the applicant, not required from the respondent
DATE OF DETERMINATION 23 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Darryl Eustace worked for Telecom Directories Limited from March 2002 until he was dismissed in April 2003. Mr Eustace lodged a statement of problem in August 2005 asking the Authority to resolve a personal grievance of unjustifiable dismissal and another personal grievance that his employment had been affected to his disadvantage by unjustifiable actions on the part of his employer.

[2] Telecom Directors Limited (TDL) lodged a statement in reply in September 2005 which included a substantial amount of documentation. There was agreement by the parties for the matter to be referred to mediation but that did not resolve the problem.

[3] Arrangements were then made for a directions conference. During the directions conference I raised a concern with counsel that the material in the statement of problem and statement in reply raised the possibility that there would be little or no compensation awarded even if grievances were established. Counsel for Mr Eustace indicated that he would want an opportunity to fully present his supporting evidence. Accordingly, I made arrangements for him to lodge and serve any statements of evidence from himself and others and any supporting documents not already provided. Arrangements were also made for me to interview Mr Eustace. The respondent was not required to provide any statements of evidence.

[4] Shortly before the interview, counsel for Mr Eustace wrote to the Authority to say that he would be relying on additional causes of action being alleged breaches of terms implied into Mr Eustace's employment agreement. Three terms and seventeen alleged breaches were listed but the applicant simply referred to the facts set out in the statement of problem dated August 2005 and evidence already lodged with the Authority. TDL objected to the late raising of additional causes of action. At the end of the interview, I advised counsel that I would consider the material lodged in advance and the evidence emerging from the interview and either issue a determination or make arrangements for further investigation, depending on the result of my consideration.

[5] While I was working on the file, I received a letter from counsel asking for the Authority to commence an investigation into Mr Eustace's other claims given that (in counsel's view) the interview had focused on the dismissal claim. A phone conference was arranged to discuss the apparent misunderstanding. As a result, I allowed counsel the opportunity to make submissions in respect of the additional causes of action and these submissions were lodged on 21 June 2006. I did not require the respondent to reply. I have reached a clear view about the resolution of the whole of this problem, as explained below.

The dismissal grievance

[6] The relevant facts can be set out reasonably briefly and are not significantly disputed.

[7] On 10 March 2003, TDL wrote to Mr Eustace requiring him to attend a disciplinary meeting concerning his sales activity in Southland during the week 24 February to 28 February 2003 and his personal use of the company credit card while in Southland. The meeting was scheduled for 11 March 2003. However, that meeting did not take place until 21 March 2003. It is not necessary to canvass the exchanges before and during the meeting.

[8] Through his solicitor, Mr Eustace requested a further meeting and that was scheduled for 1 April 2003. During that meeting there was an exchange of views about the issues and it was agreed that TDL would respond in writing and give Mr Eustace a further chance to reply.

[9] Mr Eustace is now critical of TDL's process of investigation. In particular, his evidence is to the effect that a TDL manager (Ellen Pender) said things indicating predetermination of the investigation outcome. He also says that Ms Pender and TDL's solicitor *hammered* him at the meeting. Mr Eustace also has provided evidence explaining why there is no substantive merit in the two concerns raised by TDL. It is not necessary to determine these matters because the disciplinary process took a different turn. Whether there was any predetermination about or substance to the original complaints makes no difference to the issue that caused Mr Eustace's dismissal. Even if Mr Eustace was *hammered* as he says, that behaviour caused no compensatable loss.

[10] On 2 April 2003, at about 3.15pm, Mr Eustace phoned several TDL staff members and threatened to kill two staff members who he said had lied about Shiree Palmer. Shiree Palmer was a TDL staff member who Mr Eustace was close to and who he later married. She had resigned from TDL on 14 March 2003.

[11] Having learned of the phone calls, TDL wrote to Mr Eustace on 2 April 2003 suspending him pending an investigation. I should note that Mr Eustace had reported sick during the afternoon of 1 April and rang again the next day to say he was sick so he was not at work anyway. TDL wrote to Mr Eustace's solicitor on 7 April 2003 more fully setting out its concerns about the phone calls. By that stage, TDL also knew that Mr Eustace had been arrested on 2 April 2003 in an intoxicated state, that he had an appearance in Court on 7 April on charges of threatening to kill arising from the phone calls, and that these matters were adjourned until 28 April with bail conditions requiring him

to stay away from the workplace and to refrain from contact with TDL staff. TDL explained that it saw little point in dealing further with the earlier disciplinary investigation, that it felt the appropriate course was summary dismissal based on the abusive calls to TDL staff members but that Mr Eustace could make any comment or submission on the matter within the next two days.

[12] Through his solicitor, Mr Eustace made several points. He pointed out that TDL knew that he was suffering from an illness. He said that his breakdown was directly caused by stress from work and the illness made it unfair to invoke the disciplinary code in respect of the phone calls. In the last paragraph of the letter, Mr Eustace tendered his resignation.

[13] TDL responded in writing on 10 April 2003. TDL made various comments in response to the points made by Mr Eustace's letter, it noted that there was no expression of regret or apology over the abusive phone calls made while Mr Eustace was intoxicated and advised that his employment was summarily terminated as at 10 April 2003.

[14] On or about 8 July 2003, Mr Eustace was convicted of threatening to kill on his pleas of guilty and was sentenced to a period of supervision. On 4 July 2003, Mr Eustace, through his solicitor, wrote to TDL to formally notify it of his personal grievance in respect of his dismissal. No details were provided. TDL's solicitor received further correspondence dated 25 February 2004 from another lawyer asking if TDL would attend mediation. TDL declined and nothing further happened until the present proceedings were lodged in August 2005.

[15] Mr Eustace seeks to excuse his conduct in making the abusive phone calls by attributing his drinking and therefore his behaviour to TDL. He also seeks to minimise the seriousness of his conduct by saying that he did not genuinely mean that he would kill the named staff members.

[16] In *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 488, the Court of Appeal held:

The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of 'could' rather than 'would' used in the formulation expressed in the second BP Oil case ([1992] 3 ERNZ 483) CA (at p.487). ... The burden on the employer is not that of proving to the Court the employee's serious misconduct, but on showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

[17] There was no doubt in April 2003 that Mr Eustace had made calls to employees during which he made threats to kill two employees. Mr Eustace was not at work at the time but he phoned the employees at the workplace. The allegations were clearly put to Mr Eustace and he made a response through his solicitor. TDL then made its decision to dismiss. I am satisfied that TDL conducted a full and fair investigation which disclosed conduct capable of being regarded as serious misconduct. There is no merit in a grievance complaint about the dismissal. Exactly the same result would follow if the termination of the relationship was brought about by Mr Eustace's resignation. Indeed, his resignation indicates his acceptance at the time that his actions had made the continuation of the employment relationship impossible.

[18] If it is assumed for the sake of argument that the investigation was not full and fair, and there is some merit in a grievance complaint about the termination of the employment, Mr Eustace's claims for compensation are advanced no further. Section 124 of the Employment Relations Act 2000 requires the Authority to consider the extent to which the employee's actions contributed towards the situation giving rise to the personal grievance. Mr Eustace's conviction on the charges

of threatening to kill prevents him from arguing that he did not make the threats. That behaviour would result in a 100% reduction in remedies even if the dismissal was found to be unjustifiable.

[19] Accordingly, there is no merit in Mr Eustace's claims for compensation following the dismissal and they are dismissed.

Unjustified disadvantage

[20] Resolution of the unjustified disadvantage part of the original problem requires further consideration. This is a grievance which Mr Eustace raised in a letter dated 19 December 2002 to TDL's Southern Regional Manager (Ellen Pender). In that letter, Mr Eustace complains about a number of things said by Ms Pender during a phone conversation on Monday, 21 October 2002. On Mr Eustace's account, Ms Pender was critical of his work in connection with *book close*. *Book close* is the deadline for the production of a directory. Mr Eustace also complains of comments made by his manager (Louise Stuart) about his work performance. The letter asks for an investigation into these complaints.

[21] Ms Pender responded to the letter by email on 20 December 2002 and indicated her intention to meet with Mr Eustace and Ms Stuart in the New Year. In his response on 16 January 2003, Mr Eustace said that he had no interest in meeting and entering into discussions with Ms Stuart about the complaint. He asked Ms Pender to conduct an investigation. Ms Pender accepted the position and arranged to meet separately with Ms Stuart and Mr Eustace. However, it appears that Ms Stuart did not actually meet with Mr Eustace. She subsequently sent a letter dated 18 February 2003 to Mr Eustace. The letter says that Ms Pender has investigated the complaints but does not accept them as accurate or valid.

[22] Mr Eustace responded to Ms Pender in an email dated 11 March 2003. In that email, he complains that Ms Pender did not properly investigate his complaints and that she did not interview him. He also says that the work performance concerns are without merit.

[23] Nothing further happened about this complaint until 25 February 2004 at the earliest, assuming the statement about *unresolved personal grievances relating to his treatment by Telecom Directories Limited* in the letter of that date, is a reference to this matter.

[24] Section 103(1)(b) of the Employment Relations Act 2000 sets out the relevant definition of a personal grievance. It is a claim that the employee's employment is affected to their disadvantage by some unjustifiable action by the employer.

[25] The difficulty for Mr Eustace with his complaint as described in the 19 December 2002 letter is that there is no evidence of any disadvantageous effect on his employment. Even if I assume for present purposes that Ms Stuart and Ms Pender are completely wrong in their criticisms of Mr Eustace's work performance in connection with the *book close*, that did not cause any disadvantage to Mr Eustace's employment as a sales representative for TDL. As will be explained below, Mr Eustace fell into a state of depression and commenced drinking but that pre-dated October 2002 and was unknown to the respondent at that time.

Written warning

[26] It will be helpful to set out some further background to better understand the context. Mr Eustace was issued with a written warning on 9 December 2002. That arose from him leaving work early on Friday, 22 November 2002. He was later found at a bar affected by alcohol. In his evidence, Mr Eustace says he told a colleague (Shiree Palmer) that he was going off sick before he

left work. He says that he was not in breach of TDL's drug and alcohol policy because he was not at work. The warning was issued for breaching the policy.

[27] There are some evidential disputes about what was said during the disciplinary process prior to the 9 December 2002 warning but it is not necessary to resolve them. Mr Eustace did not raise any grievance about the warning within 90 days of its receipt. The facts of the warning were not included in the statement of problem. However, the respondent did refer to the matter as part of its background to Mr Eustace's problems and Mr Eustace then advanced some evidence complaining about the issue of the written warning.

[28] In the absence of an application to raise a grievance out of time, the Authority cannot resolve Mr Eustace's complaint about the warning. The matter can go no further.

Unsuccessful job applications

[29] There are several matters set out in the statement of problem that must be given further consideration. Mr Eustace says that he applied for a trainer's position with TDL and was interviewed by Ms Pender. In his evidence, Mr Eustace complains about the interview with Ms Pender as being an attack on him and his sales performance. Although Mr Eustace was also interviewed by another person for the position, an interview that he says went very well, he was not offered the position. There followed the discussion on 21 October 2002 with Ms Pender when she elaborated on the reasons he was not offered the trainer's position. That was followed by Mr Eustace's letter of 19 December 2002 to Ms Pender raising a grievance. However, for the reasons expressed above, there is no sustainable grievance concerning the matters complained of in Mr Eustace's letter.

[30] In his statement of evidence, Mr Eustace is also critical of TDL in connection with his non-appointment to a national trainer's position. He made contact with the relevant manager (Sheryl Green), by email on 5 December 2002 and alerted her to his view that his managers were wrongly critical of him over his *book close* work performance. Ms Green responded on 14 December to say that his application would be given unbiased consideration and to check that he had raised his concerns with his managers. There was then a phone discussion between Ms Green and Mr Eustace, following which he sent his personal grievance letter dated 19 December 2002 to Ms Pender. In February 2003, Mr Eustace was interviewed for the national trainer position and he attended a second interview in Auckland on 26 February 2003. Minor personal purchases by Mr Eustace using TDL's credit card during this trip were part of the 10 March 2003 disciplinary allegations. Once TDL identified these purchases as an issue, Mr Eustace reimbursed TDL. Nonetheless, Mr Eustace's use of the credit card was a breach of policy and the repayment was not a complete answer to that part of TDL's disciplinary concerns.

[31] Mr Eustace was not offered the national trainer position. No personal grievance was ever raised about TDL's decision not to offer the position to Mr Eustace. As a result, nothing more needs to be said about this matter.

Deterioration of Mr Eustace's health

[32] Also in his evidence Mr Eustace says that his health suffered. I infer that he attributes the cause of this to the alleged attacks on him by Ms Pender and Ms Stuart and other conduct by TDL. He supports this by reference to medical notes provided by his GP. These notes reveal that Mr Eustace saw his GP on 21 August 2002. He is reported as saying *Not happy at present either. Had some tests and is depressed. Marriage break-up etc.. Dead keen to stop smoking despite the depression. Think should treat depression first then stop the smoking. been on aropax in the past, and then another one which was not as effective. Start aropax 20mg one daily. ... 30 days.*

[33] Mr Eustace saw his GP again on 23 September. The notes read *Out of aropax, with stopping aropax two days desire to drink come back. ... Rx aropax 20mg tablet. One daily for depression. 90 days.* The next record is for 8 November. The notes read *Depression pain in neck, started drinking two weeks ago, taking pills as well, work problems with victimisation* On 25 November the notes record *... has been drinking heavily since night before Yesterday chronic alcoholism. No specific trigger has been drinking heavily past four weeks. ... In new relationship six weeks and wonders if has let guard down with support.* The note on 29 November refers to needing some time off work while the 11 December note records *... uncontrolled alcohol use and increase in gambling. Conflict with employers. Increasing problems financially due to gambling.*

[34] The picture that emerges from this material is that Mr Eustace's depression predates the claimed attack by Ms Pender and work was not originally nominated by him as the cause of the depression. In evidence, Mr Eustace told me that his drinking at the time prior to the April 2003 phone incident was under control and not affecting his work. However, the notes make it clear that his drinking from late October 2002 at the latest was not under control. Mr Eustace says that he is an alcoholic and when he is not sober he has a binge drinking problem. Mr Eustace also told me that he had no history of antidepressant medication until his problems with TDL and that issues to do with his marriage break up had nothing to do with the depression. The notes show that his evidence is not correct.

[35] I find that Mr Eustace has now come to believe that his deteriorating health problems were caused by the alleged attacks. That belief has no doubt been reinforced by his perception of a lack of merit in the Southland work performance concerns and his belief that he was unfairly dismissed. However, Mr Eustace's current belief is not sufficient to establish that his health problems from August 2002 were caused by any improper conduct by his managers.

Breach of implied terms

[36] I do not accept the terms exist as formulated. The relevant obligations on TDL are not to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing; to take all practicable steps to provide a working environment and management processes so that undue stress would not be caused to Mr Eustace; and to take all reasonable care to avoid exposing the employee to unnecessary risk of injury to his physical or mental health. As the Court of Appeal noted in *Attorney-General v Gilbert* [2002] 2 NZLR 342 the implied obligation does not make the employer a guarantor of a safe workplace.

[37] For the most part, these alleged breaches were first referred to as complaints in the statement of evidence lodged by Mr Eustace in December 2005. They have been formulated late in the piece to try and circumvent the problem for the grievance claims caused by Mr Eustace's serious misconduct that resulted in a justified dismissal. The remedies claimed are damages for loss of income and compensation for the treatment by TDL. I take that last reference as a claim for non pecuniary loss.

[38] There is no loss of income attributable to any of the breaches even if they could be established. Mr Eustace's employment continued until it was terminated by him, arguably in breach of his obligation to give notice; or summarily by TDL within the terms of the employment agreement given the serious misconduct. The further difficulty is that any challenge to a dismissal can only be by way of a personal grievance: see section 113 of the Employment Relations Act 2000. It must also be said that most of the emotional distress suffered by Mr Eustace as is apparent from hospital records and the like came after an escalation in his drinking and gambling especially after the dismissal. Mr Eustace cannot recover any damages for those effects because they were not caused by any breach of contract by TDL.

[39] The only possible compensatable damage remaining is the depression for which Mr Eustace sought treatment in August 2002. Mr Eustace alleges that TDL gave him *a high and at times excessive workload* in breach the implied obligations. There is a logical problem with the assertion because much of Mr Eustace's material is to the effect that he was a high performing and hard working employee who could and did successfully handle a greater volume of work than his peers. He makes a complaint about a failure to provide *adequate training and support*. However, Mr Eustace says that he was experienced in the work before obtaining the TDL position. Indeed his view (which I have no reason to doubt) is that he was experienced in and qualified for more senior positions in the business. Several of the alleged breaches relate to the failure to offer him the other positions. I note that the August report of depression occurred before these events so it could hardly be said that the failure to offer him the positions caused his depression. The same is true about the alleged breaches relating to TDL initiating disciplinary processes about work performance and other matters. Several of the alleged breaches are about the way TDL responded to Mr Eustace's depression and drinking. When TDL learnt of these problems, it offered EAP support. What TDL did not do is excuse Mr Eustace's threats to kill just because he was drunk when he made the calls. Mr Eustace had the opportunity to mitigate his conduct by giving that explanation but it did not mean that TDL was not entitled to find serious misconduct justifying dismissal.

[40] It follows that there is no merit in the claims about breaches of implied obligation.

Summary

[41] I acknowledge that Mr Eustace's personal circumstances became very difficult, particularly after the employment ended. It is clear that those experiences now affect his perception of events prior to the dismissal. However, the termination of the employment was completely justifiable and Mr Eustace's contribution to the situation would prevent any compensation award in any event. There is no merit to the other grievance raised by Mr Eustace nor can he prevail by characterising his current concerns as breaches of implied terms. Mr Eustace fell into a state of depression but I do not accept that the illness was caused by any improper conduct by TDL's managers or that there could be any award of damages. Accordingly, all his claims are dismissed.

[42] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority