

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 308/07
5073952

BETWEEN	DION EVANS Applicant
AND	FLETCHER DISTRIBUTION LTD T/A PLACEMAKERS MT WELLINGTON Respondent

Member of Authority:	Vicki Campbell
Representatives:	Timothy Oldfield for Applicant Penny Swarbrick for Respondent
Investigation Meeting	23 April, 29 May 2007 at Auckland
Submissions Received:	12 June and 10 July 2007 from Applicant 3 July 2007 from Respondent
Determination:	4 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Dion Evans was employed by Fletcher Distribution Limited trading as PlaceMakers ("PlaceMakers"), as an Account Manager on 10 October 2005 reporting to the Sales Manager, Mr Kevin McRae. Following a written warning regarding performance issues, including concerns about Mr Evans absenteeism, Mr Evans was dismissed. Mr Evans says that dismissal was unjustified. Mr Evans seeks reinstatement to his former position, compensation for hurt and humiliation, compensation for loss of future benefits, reimbursement of wages and commission, and a recommendation from the Authority on how PlaceMakers should address any perceived performance concerns, should they arise in the future.

[2] PlaceMakers maintain Mr Evans dismissal was both substantively and procedurally justified and denies the remedies sought by Mr Evans. PlaceMakers say Mr Evans was dismissed as a result of the respondent no longer having the requisite trust and confidence in Mr Evans to the extent that continued employment was untenable.

[3] I am required to scrutinise PlaceMakers' actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act which states:

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.

[4] I must scrutinise PlaceMakers actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Credibility

[5] I found Mr Evans evidence overall to be inconsistent. For example the evidence contained in Mr Evans' written statement was that he did not understand his role and had been provided with little training. However in answer to questions at the investigation meeting Mr Evans claimed that his knowledge was superior to Mr McRae's. Further, in his written statement Mr Evans claimed he was treated differently to other sales reps as he was not allowed to take his car out of Auckland over Christmas. At the investigation meeting this was proven to be incorrect, and Mr Evans acknowledged that he had taken the vehicle out of Auckland during the Christmas break.

[6] Further and as discussed below, Mr Evans claimed in his written statement that he had not been provided with a job description. At the investigation meeting this point was scrutinised with Mr Evans conceding that he was provided with a job description and that the job description was accurate, but did not mention his "new business" focus.

[7] The above are only a sample of the contradictions contained in Mr Evan's evidence. I have concluded that the reliability of Mr Evans evidence has been compromised by his contradictory accounts. Where Mr Evan's evidence is at odds with the evidence provided by the Respondent, it is the respondent's evidence I have preferred.

Terms and conditions of employment

[8] Mr Evans was subject to a written employment agreement which set out his terms and conditions of employment. Copies of the employment agreement, job description, and PlaceMakers rules were provided to Mr Evans prior to him commencing employment.

[9] The stated purpose of Mr Evan's role was:

To grow the Branch sales and profitability by offering our clients (existing and prospective) an unrivalled level of service at competitive price (sic).

[10] To achieve this purpose Mr Evans was required to improve the volume and quality of sales to:

- Increase the number of new accounts, dollar and product range spend per customer.
- Grow the % of total customer business and buy-in loyalty programmes.
- Support and promote national and local promotions.
- Promote the use of company services where appropriate, such as any Loyalty Programmes.
- Attend other marketing/advertising/hospitality/entertainment projects and events to promote the Company's products and services.

[11] PlaceMakers rules set out standards of expected conduct relating to Mr Evans employment. The following extracts from the Rules are relevant to this employment relationship problem:

15. Performance and Success

...

Where your performance falls below the level expected by PlaceMakers this will be discussed with you, and you will be given an opportunity to improve. You will be given reasonable levels of training or on-the-job coaching to assist you to do a good job. If your performance does not improve to the required standards, then we may address the problem using the disciplinary process (see below).

16. Disciplinary Process

PlaceMakers expects a high standard of behaviour and service at all times. If we are concerned about misconduct or your performance then we will use the disciplinary process to work through this problem with you. You will be given time to prepare for any disciplinary meeting. And you will be invited to bring someone with you to a disciplinary meeting. This person may act as your witness, representative, or support person.

Some of the possible outcomes of a disciplinary meeting are:

- You may be asked to undertake actions to improve, or to attend further training or coaching to assist you meet the standards required
- You may be asked to attend follow up meetings with your supervisor
- You may have some duties temporarily changed
- You may be suspended (on ordinary pay) while further investigations are made
- You may be given a first written warning or, if you have already received a warning, a final written warning or dismissal as deemed appropriate by PlaceMakers
- If your behaviour is deemed to be serious misconduct, then you may be dismissed from employment (even if you have no prior warnings).

Mr Evans Engagement

[12] It was common ground at the investigation meeting that Mr Evans was employed as Account Manager - New Business. This was a new role and required

Mr Evans to maintain some current clients, however the biggest focus of his role was securing new business for PlaceMakers.

[13] Mr Evans was critical of PlaceMakers for not providing him with a specific job description which covered his new business focus, or a budget for him to achieve.

[14] At the investigation meeting I took Mr Evans through the job description he had received prior to his commencement. While he acknowledged the job description did apply to his role, he was critical that the description was general rather than being specific to his new business focus.

[15] I find Mr Evans complaint about not having a specific job description to be without merit. The job description he was provided with prior to the commencement of his employment more than adequately conveyed all the key tasks required of Mr Evans.

[16] I also do not accept as having merit, Mr Evans claims that he was never provided with a budget to work to in his sales portfolio. Mr Evans was paid on the basis of a retainer plus commission. The commission applied after a specific sales target (set in monetary terms) had been reached. At the investigation meeting Mr Evans did not accept that the \$20,000 sales target, was a target. He did not see the \$20,000 as something he could strive towards.

[17] It was common ground that in November 2005 Mr Evans drafted a document outlining a plan to grow his portfolio. In his plan Mr Evans suggests minimum performance expectations, in that he would make four cold calls each day, one cycle call and one order/problem solving call on prospective and current clients of PlaceMakers. The plan was agreed to by Mr McRae.

[18] I am satisfied the November 2005 document, which Mr Evans wrote, sets out the agreed daily call targets for Mr Evans and the plan was not changed throughout his employment.

Induction

[19] Mr Evans was critical of the initial training he had received which he said did not amount to much. Mr Evans says his product training focussed on basic building lines. He didn't receive any training on how to read a plan, although he was required to collect plans and give the builders an estimation. He said he raised this pretty soon after he started and was told to ask the estimator. He said the estimator spent about 10 minutes with him going over a building plan.

[20] Mr Evans told me he was told in the first week that he would be required to solicit business and that in order to do that he should go out and drive round, find building sites, find their decision maker, and get plans off the decision maker so that a quote could be given. He told me that Mr McRae told him that he should go out on the road and spend the day with each of the sales rep and watch how it was done.

[21] At the investigation meeting Mr Evans told me that he had been employed for about three weeks before he was allowed out by himself on the road. He said he spent a whole week working on the trade counter to give him experience on the ACE system and on the second week he went out on the road. Mr Evans did not accept that these actions constituted an induction process. He said his understanding of induction is arriving on the first day, getting equipment such as the steel cap boots or car, phone and business cards and an induction should have had a plan detailing the movements.

[22] Mr McRae says during Mr Evans induction period he spent at least a day in estimating, telesales, trade counter and the timber yard. Mr McRae says there was a planned induction process to ensure Mr Evans was exposed to all areas of the business. Mr Evans would have gone out with each rep for at least half a day each over the two week induction period. Mr McRae was adamant that this induction process was vital for Mr Evans as he had had no previous exposure to the business. Further, Mr Evans would have spent at least a day in the estimation department and that if he had any difficulties in reading the building plans, staff in the estimations department were available at any time to provide advice to Mr Evans on the plans.

[23] While Mr Evans did not perceive the initial two weeks spent as constituting an induction process, I am satisfied that PlaceMakers made adequate efforts to acquaint Mr Evans with the particular business and product knowledge necessary to enable him to utilise his very good sales skills, particularly his cold calling skills, during the initial stages of his employment.

Relationship with Mr McRae

[24] Mr Evans says that during his employment he experienced abuse and intimidation from Mr McRae. By way of example he told me that in November 2005 he requested time off to attend his niece's christening in Wellington. He

said Mr McRae refused his request, and demoralised him with put downs and profanities in what Mr Evans describes as a "hostile outburst".

[25] Mr McRae says Mr Evans wanted to take a Friday afternoon off and told him that he would have to decline the request. Mr McRae says Mr Evans was most unhappy about the refusal and he stormed off.

[26] It was common ground that Mr Evans advised Mr Sellars about the exchange between himself and Mr McRae which had left Mr Evans feeling stressed and threatened. Mr Evans says Mr Sellars wasn't surprised to hear about the incident and told him it was not the first complaint he had received in regard to Mr McRae's outbursts.

[27] Mr Sellars denies telling Mr Evans that he wasn't the first complaint. Mr Sellars says that his recollection of this event is that he told Mr Evans he was aware of Mr McRae's abrasive style and that he would talk to Mr McRae about his [Mr Evans] concerns.

[28] As a further example of Mr McRae's treatment of him, Mr Evans told me that he had to go downstairs to the telesales area for his office space instead of being included in the general sales area. In response to this Mr McRae told me Mr Evans role was additional to the established sales representative roles and that there was no room for him to be placed in the general sales area. Mr McRae says it was decided that the next best place for him would be to place him close to the telesales staff. The decision to place Mr Evans desk in that area was not intended to be detrimental to him or to indicate that he wasn't as much a part of the sales team as others, it was simply a matter of convenience.

[29] Further, Mr Evans points to his request, made at the first disciplinary meeting on 27 January 2006, to have a change in reporting line from Mr McRae to Mr Sellars, as supporting evidence that Mr McRae was intimidating and bullying him. Miss Manning says while the request was raised by Miss Barker on Mr Evans behalf, there was no specific or explicit allegation of intimidation or bullying made at that meeting.

[30] I am satisfied Mr McRae had a very direct and abrupt style in his communications with staff generally at PlaceMakers, but he was not a bully. I am supported in this conclusion by the evidence of Mr Sellars and Mr Nigel Karl, a sales representative employed by PlaceMakers, who both told me Mr McRae could

be abrupt in this dealings. Further to that, Mr Evans acknowledged at the investigation meeting that he like to antagonise Mr McRae.

First Warning

[31] It was common ground that by January 2006 the company held concerns about Mr Evans performance in bringing in new business. Ms Manning, an HR Consultant working with the Fletcher Challenge Group told me Mr Evans' position was additional to the normal sales staff and that his role was to bring in new business. Ms Manning told me Mr Evans failed to keep an accurate record of the calls he was making and because of problems with the PDA system Mr McRae had asked Mr Evans to log his calls manually.

[32] On 23 January Mr McRae wrote to Mr Evans requesting a meeting to discuss concerns about his performance and setting out specific areas of concern to be discussed:

- 1) Sales performance-developing existing portfolio
- 2) Sales growth-new leads and customers
- 3) Support person and wider team
- 4) Disappearing without notice and or reporting
- 5) Not accounting for you/time (sic) in terms of 'Call' reporting
- 6) Use of company vehicle
- 7) Amount of sick leave taken and it's appropriateness

[33] In his letter Mr McRae advised Mr Evans that the issues had undermined the confidence and trust the company had in Mr Evans capability to do his job. Mr McRae expressed his desire that the meeting be positive in determining how to ensure improvement in Mr Evan's performance, and also identified that a possible outcome from the meeting was a written warning.

[34] The meeting took place on 27 January 2006. Mr Evans attended with Ms Sarah Barker, a senior organiser with the Service and Food Workers Union Nga Ringa Tota Inc.

[35] On 1 February 2006 Mr McRae confirmed in writing the outcome from the meeting. I have set out the areas of performance improvement discussed and agreed at the meeting:

1. You will work to your agreed (and signed) sales goals by achieving the minimum if not exceeding the call goals set out in your Sales Plan Work Plan.
2. You will provide daily call reports which will continue for 3 months but should I have regained confidence in your performance before the period of 3 months, then the daily reporting may be adjusted to weekly, or fortnightly, at my discretion.
3. To give you a genuine opportunity to assist you to improve I have undertaken to hold your Commissions threshold at \$20,000 (for a further two months) until June when it will

revert to the standard of \$40,000. Which we have agreed would be the minimum monthly performance target.

4. For the relatively short period of your employment I believe your unplanned absences and sick leave have been excessive. In terms of future sick leave you may be requested to provide a Medical Certificate. In terms of unplanned absences I believe that there has been a breach of PlaceMakers Rules as provided to you and signed by you. Specifically:

If you cannot get to work for any reasons, please telephone your supervisor either before or within one hour of your normal start time and explain why you are absent and when you expect to return to work. If you are unable to telephone your supervisor yourself then you should arrange for a message to be sent to your supervisor. You should also let your supervisor know how to get in touch with you while you are absent.

As clearly stated in the rules any breach in the future will be considered serious and may result in action being taken up to and including dismissal.

5. With both your Phone and Car accounts you will bring them in line to what is considered reasonable by way of comparison with other similar Sales personnel. We have agreed that should you wish to take the company car out of greater Auckland area you will seek prior approval.

[36] In the final two paragraphs of the letter Mr McRae sets out his expectations that Mr Evans will show a rapid improvement in his performance in all areas and that the situation will be reviewed. No timeframes were set for the review.

[37] Mr Evans was warned that should his performance in the areas specified above not improve action up to and including dismissal may be taken.

[38] At the investigation meeting Mr Evans was critical of PlaceMakers for not providing a copy of the 1 February 2006 letter to the union before he was given a copy of it. I received a lot of evidence regarding this issue and have concluded that the letter of 1 February 2006 fairly deals with everything discussed and agreed at the meeting on 27 January 2006. I am supported in this conclusion by Ms Barker's evidence at the investigation meeting when she told me Mr Evans himself took the letter and signed it. Ms Barker said that when Mr Evans signed the letter he never raised any issues with the agreements that were set out.

[39] I am satisfied that there was no failure in the process leading up to the warning as a result of not putting the letter in the hands of the union first. I have concluded that there was no clear agreement between the parties as to what was to happen with the letter. Ms Barker told me she assumed that she would see it first but it wasn't clear in the meeting on 27th January whether that would be the case or not.

Performance following warning

[40] Mr Sellars told me that for a period of a couple of weeks following the warning Mr Evans seemed to step up in terms of effort and attitude. Mr Sellars

told me he had had reports from Mr McRae that he was meeting daily sales targets.

[41] This was confirmed by Mr McRae who told me he saw an improvement in Mr Evans attitude and he had stepped up. Mr McRae says there was a couple of weeks when they had some great meetings and he felt things were actually on track.

Events leading to dismissal

[42] On Thursday 16 February 2006 Mr Evans failed to attend the regular weekly sales meeting which commenced at 8.00am that morning. I accept Mr McRae's evidence that Mr Evans told him he had "...forgotten..." and that later in the day Mr Evans changed his account of why he missed the meeting and told Mr McRae he had been to A & E that morning.

[43] At the investigation meeting Mr Evans acknowledged that he did not arrive at work until 8.40 that morning, being 40 minutes late, and that he had not made any contact with Mr McRae, before his usual start time, to advise that he may or would be late.

[44] On 17 February 2006 Mr Evans phoned into Mr McRae's office phone and left a message at 5.10am advising that he would not be in and that he had a sore back. Mr Evans attended his doctor on 20 February 2006 and received a medical certificate stating that he was unfit for work from 17 February to 21 February 2006.

[45] Ms Manning says that calling Mr McRae and leaving a message at 5.10am is not a disciplinary matter, but demonstrated his reluctance to contact Mr McRae directly and was akin to avoiding contact.

[46] Initially the medical certificate was not given to Mr McRae. It was only after Mr Evans had returned to work and several requests had been made that he produced it.

[47] On 21 February Mr McRae wrote to Mr Evans outlining concerns relating to Mr Evans failure to attend work and to give adequate notice or reasons for non attendance and attached a copy of Mr Evan's absenteeism record.

[48] At the time of his employment Mr Evans had properly disclosed to PlaceMakers that he had secondary employment in a bar. In his letter Mr McRae advised that he held concerns relating to Mr Evan's secondary employment and requested information as to dates and times he had been undertaking his additional employment. Mr McRae concluded his letter by advising:

I hope that our meeting is positive however, I feel I should flag to you that an outcome maybe disciplinary action up to and including dismissal.

[49] On 22 February 2006 Mr McRae was going to be absent from the office at the time he was due to have his daily 3.00pm meeting with Mr Evans. To ensure the meeting would still go ahead Mr McRae made arrangements for Mr Sellars to meet with Mr Evans instead. The meeting never eventuated.

[50] Mr Evans says he arrived at Mr Sellar's office 15 minutes early at 2.45pm. At that time Mr Sellars already had someone in his office with him. Mr Evans says he waited for about five to ten minutes and then told the receptionist that he would be in his office, and that when Mr Sellars was free he would come up. As he left Mr Sellar's office, Mr Evans says he asked the receptionist to ring him when Mr Sellars was ready to see him. Ms Manning told me that before the final disciplinary meeting she had checked with the receptionist, who had advised her she told Mr Evans that she would not ring him, and that it was for Mr Evans himself to make contact with Mr Sellars.

[51] Mr Evans says he got back to his office and started doing work and it wasn't until 3.30 he realised he had missed his meeting. Mr Evans says that by the time he got back to Mr Sellars' office he already had someone else in his office with him.

[52] In answer to questions at the investigation meeting Mr Evans was adamant that once he had asked the receptionist to make contact with him he had no obligation to keep a check on the time and to make sure he attended the meeting in a timely fashion.

[53] The disciplinary meeting took place on 27 February 2006. At that meeting Mr McRae tabled a document which set out all the issues to be discussed. The issues included Mr Evans failure to attend meetings, failure to provide medical certificates, contacting his manager at 5.10am to advise that he would not be at work, concerns about Mr Evans back given that he had been absent twice due to back problems, and Mr Evans' inappropriate hair style. Mr Evans was also advised:

Finally, our Trust and Confidence has been totally eroded given the above but on top of this, it has been reported by staff members that they are in receipt of comments made by Dion concerning his bragging that he got a large sum payout from [his previous employer]...

[54] This issue related to a report that Mr Evans was encouraging other employees to take a personal grievance against PlaceMakers in anticipation of a monetary payout. It had also been reported to Mr McRae and Ms Manning that Mr Evans had purportedly told staff, while waving his invitation to attend the disciplinary meeting around, that he was in for a large payout.

[55] Mr Evans says that as the meeting started it seemed to him that the issues being raised were the same ones that had been discussed in January. Mr Evans told me he had been making a conscious effort to improve.

[56] The meeting was adjourned at the request of Ms Barker and reconvened the following day on 28 February 2006 in order for Mr Evans to consider the tabled document and to provide a full response.

[57] At the meeting on 28 February 2006 and after hearing from Mr Evans and Ms Barker, Mr Evans was dismissed. Mr McRae had reached a conclusion that he had lost trust and confidence in Mr Evans ability to perform in his role. Mr McRae confirmed the reasons for Mr Evan's dismissal by letter dated 21 March 2006 which states:

On 27 February 2006 the Branch Manager and I came to the conclusion that we had lost trust and confidence in Dion's capability to perform in his role. Our conclusions were reached based on the events and incidents outlined in our previous correspondence to Dion.

...

Given that Dion had a genuine opportunity to improve and failed to do so. It was concluded that there was no intention on his part to improve and to perform professionally in his role.

[58] The issue of Mr Evans waving his letter around and suggesting he would get a payout was a major concern to PlaceMakers. It was this incident, and Mr Evans cavalier attitude towards turning up for meetings and his continued absences which caused it to consider it had lost trust and confidence in Mr Evans.

[59] Miss Manning says she and Mr McRae had a sense that they were being provoked by Mr Evans. She said they didn't believe that Mr Evans was truly committed to his improvement and decided that they could not trust Mr Evans' commitment to improve.

[60] It was Ms Manning's view that the 5.10am call to Mr McRae, was a bizarre time to be calling his supervisor and that it was felt they were making no progress with Mr Evans at all.

Determination

[61] PlaceMakers had embarked on a process to try and turn Mr Evans performance around. The only reference to a timeframe for improvement in the letter of 1 February 2006 sets out a period of 3 months during which, if Mr McRae had regained confidence in his performance, Mr Evans may not be required to provide daily call reports.

[62] PlaceMakers say that during that process, other issues came to the attention of Mr McRae which led to a conclusion that PlaceMakers no longer had the requisite trust and confidence in Mr McRae to perform his role.

[63] At the investigation meeting Miss Manning told me Mr Evans' conduct in discussing exit packages, and encouraging other staff to seek advice about their employment relationship problems was like a challenge and that he was provoking the managers. She says there were concerns about what he was saying to customers. If that was the case, then this aspect of PlaceMakers concerns should have been put to Mr Evans for his response at the disciplinary meeting. It wasn't.

[64] It seems that the last straw for Mr McRae was actually the fact that Mr Evans had apparently arrived at work with his hair shaped by gell, in the style of a Mohawk. Mr McRae was outraged when he saw this, although at the investigation meeting it was acknowledged that this matter was not disciplinary in nature. I am satisfied the hair style was a contributing factor in the decision to dismiss Mr Evans, however, it was not the most pressing.

[65] Following clearly set out expectations on 1 February, that Mr Evans would make contact with his supervisor when he was unable to get to work for any reason, Mr Evans missed a standard meeting on 16 February and then failed to attend a pre-arranged meeting with Mr Sellars on 22 February 2006. I am satisfied however, that in regard to the absence from 17 – 21 February, Mr Evans took steps to inform his employer of his absence, albeit it took a number of enquiries before he produced the requisite medical certificate.

[66] I am also satisfied that on the balance of probabilities it is more likely than not that Mr Evans had informed staff that he was intending to obtain an exit package from PlaceMakers. I am supported in this conclusion by Mr Evans own evidence when he told me of a conversation he had with the estimator on 23 February 2006 and during which he told the estimator it was time for him to start thinking about an exit package.

[67] I accept the submissions made on behalf of the respondent that through his conduct Mr Evans was not demonstrating a receptive response to the efforts being made to assist in the improvement of his performance.

[68] However, in deciding whether Mr Evan's overall actions can constitute good reason for summary dismissal, regard must be had to the nature and degree of the misbehaviour and to its significance in relation to PlaceMakers' business and to Mr Evans position as a sales representative. I weigh Mr Evans's conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between him and PlaceMakers as against the severe consequences of immediate dismissal. If it is to warrant that response the misbehaviour must go to the heart or root of the contract between them.

[69] The evidence shows that following the 1 February letter Mr Evans demonstrated improvements in his sales work. However, I am not satisfied the events that have contributed to the conclusions of PlaceMakers that it had lost trust and confidence were sufficiently grave as to require his immediate dismissal. The events were: his lateness to the meeting on 16 February; the phone message left at 5.10am on 17 February; the failure to attend a meeting at the appointed time on 22 February (although this occurred after the letter inviting him to a second disciplinary meeting had been written); and the issues surrounding Mr Evans encouragement that another employee take a personal grievance and his boasting that he personally was looking at an exit payout.

[70] Having considered all the evidence and the submissions made by both representatives I have concluded that Mr Evans dismissal was unjustified. There are varying degrees of misconduct and it is only serious misconduct that can justify termination of employment. I do not regard it reasonable that PlaceMakers could consider Mr Evan's actions after 1 February 2006 as constituting a complete and irremediable loss of trust and confidence in him.

Remedies*Reinstatement*

[71] Mr Evans wishes to be reinstated to his previous employment. I am mindful that reinstatement is the primary remedy where it is practicable. I am not satisfied that reinstatement in this case is practicable. Mr Evans was dismissed on 28 February 2006. It wasn't until June that Mr Evans first mentioned that he was seeking reinstatement. By then Mr Evans role had been filled and no other vacancies were available.

[72] No further communications were made by Mr Evans to pursue reinstatement until five months later in December 2006 when Mr Evans filed his statement of problem in the Authority.

[73] Further, Mr Evans was already subject to a written warning. His tenure at PlaceMakers was much more tenuous than if he had not received a warning and all indications were that had PlaceMakers continued to monitor and manage his performance Mr Evans employment may not have lasted past the three month review set out in the letter of 1 February 2006.

Lost wages

[74] Mr Evans had an obligation to mitigate his loss following his dismissal. Mr Evans told me he took no steps to find alternative work until 4-5 weeks after his dismissal, however, he has not produced any medical or other evidence to support his statements that he was too distressed to consider looking for work.

[75] I accept the submissions from the respondent that in the current buoyant employment environment it is difficult to accept that Mr Evans was not able to secure alternative employment, particularly in light of his very good sales skills and professional qualifications.

[76] Further, Mr Evans accepted at the investigation meeting that sales jobs were plentiful in the car industry, an industry Mr Evans has experience in, however, he had made a decision not to work in that industry and so did not apply for any jobs that may have been available.

[77] I am dubious of the evidence Mr Evans gave me regarding to his efforts to secure work and the veracity of the documentation he provided. Mr Evans own evidence was that the company which provided one of the letters he has produced to the Authority, supporting his evidence that he made applications for jobs, had not told the truth.

[78] I am not satisfied Mr Evans did all he could reasonably be expected to do to mitigate his losses. Mr Evans received one months pay in lieu of notice. Taking that into account I have concluded that Mr Evans should receive lost earnings for a period of two months making a total of three months from the date of his dismissal. The order for lost wages shall be subject to a reduction of 50% pursuant to my findings on contribution.

[79] As Mr Evans has not quantified his loss the parties should agree the quantum to be paid to Mr Evans for the one months loss of wages which will include an amount to account for the loss of benefits relating to the personal use of the company car and medical insurance payments, but is to exclude any amount attributable to the provision of a company cell phone.

[80] I reserve leave for the parties to return to the Authority for a determination on the lost wages in the event that they are not able to come to any agreements. If that happens I will expect Mr Evans to provide fuller and better particulars of his loss, to the Authority.

Fletcher Distribution Ltd t/a PlaceMakers is ordered to pay to Mr Evans an amount equal to one month salary and other benefits lost pursuant to sections 123(b) and (c)(ii).

Compensation

[81] Mr Evans gave evidence that he was embarrassed and shocked at his dismissal. Mr Evans says that he felt he had tarred not only his own reputation but also that of his parents and partner. The Authority can only award compensation to an applicant in relation to the effect the action giving rise to the grievance had on the applicant, not third parties.

[82] Mr Evans was given a box by Mr McRae, to empty his personal belongings into. He was then escorted off the premises without being given the opportunity to say farewell to his colleagues. Mr Evans told me, and I accept, that this was humiliating.

[83] Taking into account the generally modest level of awards made in cases of this type and the particular circumstances of this case an award of \$5,000 would be appropriate compensation for the humiliation and injury to feelings of Mr Evans. This will be subject to a reduction of 50% pursuant to my findings on contribution.

Subject to my findings on contribution Fletcher Distribution Ltd t/a PlaceMakers is ordered to pay to Mr Evans \$2,500 pursuant to sections 123(c)(i).

Contribution

[84] Section 124 of the Employment Relations Act requires the Authority to consider whether Mr Evans actions contributed towards the situation giving rise to the personal grievance to an extent that requires reduction of the remedies that would otherwise be awarded.

[85] Mr Evans knew dismissal was highly likely, he had said as much to a work colleague when he told the worker that it was time to look at an exit package. Following his dismissal Ms Manning requested the IT department to retrieve Mr Evan's email account, however, every computer entry under Mr Evans login had been deleted up to the date of the final meeting of 28 February 2006. At the investigation meeting Mr Evans denied deleting anything from his computer, however, I prefer the evidence of the respondent on this matter.

[86] It was common ground at the investigation meeting that Mr Evans liked to antagonise Mr McRae. Leaving messages on Mr McRae's phone at 5.10am rather than contacting him during normal working hours, and winding up other staff members about large payouts for personal grievances tends to demonstrate the types of behaviours Mr Evans exhibited in that regard.

[87] I find Mr Evans did contribute to the situation giving rise to his personal grievance. In all the circumstances of this case I consider a 50 percent reduction of remedies is required to take account of Mr Evans own actions in bringing about the end of his employment with PlaceMakers.

Recommendation

[88] In his statement of problem Mr Evans has asked the Authority, pursuant to section 123(1)(ca) to make recommendations on how PlaceMakers should address any perceived performance concerns should they arise in the future. I am satisfied that PlaceMakers have addressed the procedure for dealing with performance issues and disciplinary processes more than adequately in its PlaceMakers Rules document. No recommendations are therefore necessary.

Costs

[89] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum

as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority