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## Ewans v Nicholas Realty Limited AA339/10 (Auckland) [2010] NZERA 658 (28 July 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 339/10 5286677

BETWEEN

AND

MURRAY EWANS Applicant

NICHOLAS REALTY Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Vicki Campbell

Mark Nutsford for Applicant

No appearance for Respondent

11 May 2010 29 July 2010

### DETERMINATION OF THE AUTHORITY

[1] Mr Ewans lodged his statement of problem in the Authority on 12 November 2009. No statement in reply has been received from Nicholas Realty Limited ("Nicholas Realty"). The Authority experienced great difficulty in making contact with Mr Amir Hannani, the sole Director and shareholder of Nicholas Realty, to arrange a conference call to discuss how this matter would proceed. These fruitless attempts led the Authority to direct the parties to mediation.

[2] The Mediation Service also encountered difficulties in contacting Mr Hannani, however, eventually he advised the Mediation Service that he would be available to attend a mediation on 19 March. Unfortunately that date was not suitable for the Applicant. Further attempts to contact Mr Hannani to select an alternative date were unsuccessful and this matter comes to the Authority without the benefit of having been to mediation.

[3] On 6 April Nicholas Realty was advised by the Authority that as a result of its failure to lodge a statement in reply it would need to have the leave of the Authority to respond or defend the matter and the matter was set down for investigation. Mr

Hannani emailed the Authority on 26 April advising that he was out of the country and would not be back for at least two months.

[4] On the day before the scheduled investigation meeting the Authority learnt that Mr Hannani was working for a local Harcourts Office. The Authority contacted the office and made enquiries of Mr Hannani. That office seemed confused as to whether Mr Hannani was in town or not. In any event, a cell phone number was provided and a message left for Mr Hannani reminding him of the investigation meeting set down for the following day. No response was received from Mr Hannani.

[5] The Authority is satisfied the respondent was served with the documents notifying it of the investigation meeting and the

consequences of non attendance. Pursuant to clause 12 of Schedule 2 to the [Employment Relations Act 2000](#) I proceeded to hear, and have determined the matter, as if Nicholas Realty had attended or been represented at the investigation meeting.

## **The Employment Relationship**

[6] Mr Murray Ewans was employed by Nicholas Realty Limited ("Nicholas Realty") in the position of Principal Officer located at Blockhouse Bay on 19 January 2009. The relationship was governed by a written employment agreement which was amended by agreement in March 2009.

[7] On 19 February 2009 Mr Ewans agreed to become a Director of Nicholas Realty. In March Mr Ewans was appointed to manage the newly acquired Takapuna branch of the respondent. Mr Ewans' job description continued to encompass some of his previous management role at Blockhouse Bay.

[8] Mr Ewans was to have commenced working from the Takapuna office from 1 April 2009, however delays in the refurbishment of the Takapuna offices precluded this from happening. Mr Ewans became increasingly concerned about the lack of progress on the refurbishment and confronted Mr Hannani, who advised Mr Ewans the Takapuna project was not proceeding.

[9] On 15 June 2009 Mr Ewans salary payment bounced. When confronted Mr Hannani apologised and assured Mr Ewans that it wouldn't happen again. Payment was made on 19 June. Two further salary payments were not met on their due date but were eventually paid on 17 July 2009.

[10] When his salary payment did not get paid again on 29 July Mr Ewans paid himself by company cheque ensuring the transaction was properly accounted for.

[11] Concurrently, other consequences of accounts not being paid were becoming apparent. For example due to the non-payment of the franchise fees the franchise support system through Ray White was cancelled on 31 July 2009.

[12] On 31 July 2009 at about 2.30pm Mr Ewans says Mr Hannani arrived at the office with a briefcase containing a considerable amount of cash. He gave Mr Ewans \$4,000 which Mr Ewans deposited into the company account and drew cheques on to pay outstanding accounts.

[13] Mr Ewans says Mr Hannani also asked about paying the outstanding franchise fees but Mr Ewans advised him against that and explained that Ray White had made it clear that even if payment for the outstanding fees were made they would not allow the franchise to continue.

[14] Mr Ewans says that the following day he received an abusive phone call from Mr Hannani complaining that the franchise system was not on line and that he had lost all his emails as a result. During this conversation Mr Hannani also enquired about the cash he had given Mr Ewans the previous day and what had happened to it. Mr Ewans says he told Mr Hannani that he had used it to pay outstanding accounts.

[15] At about 3.00pm that day Mr Ewans received a second abusive telephone call from Mr Hannani demanding that he meet him at the office at 5.00pm. Mr Hannani arrived at the office at about 5.25pm and asked Mr Ewans why he had not paid the outstanding franchise fees and accused Mr Ewans of ruining his business.

[16] Mr Ewans says Mr Hannani was very agitated and was screaming and swearing. He told Mr Ewans to f\*\*k off and that he never wanted to see him again. Mr Ewans says Mr Hannani insisted that he write a letter saying he would return the money he stole by 1.00pm on Sunday. Mr Ewans, concerned about Mr Hannani's apparent irrationality, says he wrote on a piece of paper and left the office.

[17] Over the next two days Mr Ewans received a tirade of vitriol by way of text messages and phone messages. He received at least 20 extremely abusive phone calls containing threats as extreme as the threatened rape of Mr Ewans wife.

[18] Mr Ewans says he was dismissed through the actions of Mr Hannani on 1 August, and that the dismissal was unjustified, Mr Ewans seeks remedies of lost wages, compensation and costs.

[19] The issues for determination are whether Mr Ewans dismissal was justified and if not then what, if any remedies, should be awarded.

[20] The Authority is required to examine Nicholas Realty's actions in accordance with the statutory test of justification set out at [section 103A](#) of the [Employment Relations Act](#). The section 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.

## **The Dismissal**

[21] There is no dispute that Mr Hannani's actions on 1 August when he sent Mr Ewans away was intended to amount to a dismissal. Mr Hannani believed that Mr Ewans had stolen the \$4,000 he had given him.

[22] Mr Ewans has provided the Authority with a transcript of text messages sent by Mr Hannani to Mr Ewans from 30 July to 3 August. The text messages from Mr Hannani are distasteful, full of vulgar expletives and are far from professional.

[23] I have no hesitation in finding Mr Ewans' dismissal unjustified. If Mr Hannani had taken the time to discuss the whereabouts of the money with Mr Ewans he would have discovered that Mr Ewans' had banked the \$4,000 in the business bank account as instructed on 31 July 2010. I find Nicholas Realty has failed to act as a fair and reasonable employer would have acted in all the circumstances of this case.

[24] Mr Ewans has established his personal grievance to my satisfaction and is entitled to remedies.

### **Remedies**

[25] As required by [section 124](#) of the [Employment Relations Act](#) ("the Act") I have considered whether Mr Ewans contributed to the situation giving rise to the grievance.

I find that Mr Ewans conduct was not blameworthy in any way and therefore the remedies will not be reduced.

[26] Mr Ewans is a 63 year old man and says he found it extremely difficult to find new employment. He is now working however, but was out of paid employment for a period of five months. Mr Ewans has provided evidence of his mitigation. He has made many applications for employment but to no avail. Mr Ewans is entitled to be reimbursed for his actual loss which he says amounts to \$30,000.

[27] Mr Ewans seeks payment of \$15,000 by way of compensation for hurt and humiliation. Mr Ewans was subject to an unusually high level of abuse by his former employer after he was dismissed without regard on 1 August. Mr Ewans and his wife gave compelling evidence as to the effects of the dismissal on Mr Ewans. Mr Ewans was so well regarded by Mr Hannani when he was first employed by him that he was made a Director of the company. I order Nicholas Realty to pay to Mr Ewans the sum of \$10,000 for distress, compensation and humiliation.

**Nicholas Realty Limited is order to pay to Mr Ewans the following sums within 28 days of the date of this determination:**

- **\$30,000 lost wages pursuant to [section 123\(1\)\(b\)](#) of the Act; and**
- **\$10,000 compensation pursuant to [section 123\(1\)\(c\)\(i\)](#) of the Act.**

### **Costs**

[28] Costs are reserved.

Vicki Campbell

Member of Employment Relations Authority