

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 312
5362104

BETWEEN JOHN ALLAN GARNER
 Applicant

A N D PEARCE FLOORING
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: M Harvey, Counsel for Applicant
 M Pearce, Advocate for Respondent

Investigation meeting: 13 April 2012 at Rotorua

Date of Determination: 7 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr John Garner, claims that he was unjustifiably dismissed on 19 October 2011. Mr Garner asks that the Authority find that he has a personal grievance and award him the remedies of reimbursement of wages and compensation pursuant to s.123(1) of the Employment Relations Act 2000 (the Act).

[2] Conversely, the respondent, Pearce Flooring Limited (PFL), says that Mr Garner was not suitable for the position for which he was employed and was offered alternative positions, but he rejected those and decided to leave.

Background facts and evidence

[3] Mr Garner is an experienced floor covering installer. In September 2011, PFL advertised a sales position. Mr Garner was interviewed for the role by Ms Lisa Boerboom, the manager for the business. It is commonly accepted that Mr Garner did

not have any sales experience. But he conveyed during the interview that he wished to take a change of direction into selling floor coverings as the installation of flooring was becoming physically demanding. Mr Garner believed that because of his experience installing floor coverings, he had obtained good product knowledge and was also conversant with the best installation practices and techniques.

[4] Following the interview with Ms Boerboom, Mr Garner had a further interview with her and Mr Malcolm Pearce, the managing director of PFL. Mr Garner was subsequently offered the sales position.

[5] It is the evidence of Mr Pearce and Ms Boerboom that Mr Garner was informed that there would be a trial period for a few days to assess his ability to cope with the customer service requirements and to assimilate information about pricing and products. But Mr Garner says there was no discussion about a trial period. Unfortunately for all concerned, there is no written record of the employment arrangements. I conclude that at best, both parties probably accepted that Mr Garner had no sales experience and that there was going to be something of a learning period for him, with an assessment in due course, regarding his suitability for the sales role.

[6] Mr Garner commenced his employment with PFL on 17 October 2011. The evidence of Mr Pearce is that Mr Garner “did not impress” upon his arrival. Mr Pearce says that Mr Garner was in need of a shave and had his shirt hanging out. I observed Mr Garner at the investigation meeting whereby he had some growth of a beard that some might deem fashionable. Mr Garner explained to the Authority that he was wearing the same clothing at the investigation meeting that he wore to work at PFL, whereby his shirt was worn outside his trousers, which is now considered to be generally acceptable to most people.

[7] After showing Mr Garner around the shop for an hour or so and introducing him to other staff members, Mr Pearce then took him to meet customers. This involved preparing quotes for the jobs where appointments had been made for such purpose.

[8] The evidence of Mr Pearce is that he found that Mr Garner’s measuring and planning skills to be “lacking”. Mr Pearce says he was surprised about this given Mr Garner’s experience as an installer. The two men went back to the shop after doing measurements for three or four jobs. Mr Pearce says that Mr Garner had

observed him doing two quotes and he gave him the information about one of the jobs that had been quoted for and asked him to produce a sample quote. Mr Pearce attests that upon receiving this from Mr Garner, he could not understand it: “...as his ability to process the information and transfer it to paper in a legible fashion was appalling.” Mr Pearce says that he then had doubts about Mr Garner’s suitability for the role.

[9] The business has a sample van and when the lunch break arrived, Mr Garner used the van to go to his home for lunch without obtaining permission from Mr Pearce or Ms Boerboom. They say that they were surprised as Mr Garner had not yet been confirmed in his position and personal use of the company vehicles had not been discussed. But Mr Garner says that he was told that he would have the use of the vehicle and he understood this was from his first day on the job. The advertisement on Trademe also refers to a vehicle and mobile phone being provided.

[10] After the lunch break on this first day of employment, Mr Pearce took Mr Garner out to another three jobs. Upon returning to the shop, Mr Garner was asked to familiarise himself with the products and to ensure the shop was tidy and well presented. Mr Pearce says that he expected Mr Garner to ask about following up on the existing quotes, but this didn’t happen. At 5:00pm, Mr Garner left to go home in the company van.

[11] On the second day of his employment, Mr Garner arrived at 8:00am and accompanied Mr Pearce to an inspection of an existing job at 8:30am. Mr Pearce says that on the drive back to the shop, he explained to Mr Garner that although the start time was 8:00am, it would be practical for him to arrive five or ten minutes early in order to check the work programme for the day and ensure that if an 8:00am appointment with a customer had been arranged, he would be available. Just quite why this would not be known before the close of business the day before, is not explained by Mr Pearce, but he says that Mr Garner was “not receptive” to starting earlier as suggested.

[12] The further evidence of Mr Pearce relates to attending another customer whereby a measurement at a residence was required. Mr Pearce is critical of Mr Garner, in that he spent time chatting to the customer (whom he apparently knew) while Mr Pearce carried out the measurements for the job. Mr Pearce says that upon returning to the shop, he was starting to “seriously doubt” Mr Garner’s suitability as a

sales person. It was arranged that Mr Garner would spend the rest of the second day of his employment with other staff members. Mr Pearce attests that he needed the observations of other staff to determine whether Mr Garner was able to “cope” with the sales position.

[13] Upon the lunch break arriving, Mr Garner took the work van home again without checking it might be required for other purposes. Mr Pearce says that Mr Garner did not take the business mobile phone with him and so could not be contacted if required for business purposes, but he returned to the shop after about half an hour had elapsed.

[14] The further evidence of Mr Pearce is that, upon his return from the lunch break, Mr Garner made a few phone calls and chatted to other staff members but he did not make any inquiry about whether quotes needed to be done or whether he could assist others. Mr Garner was observed talking to one potential customer but did not ask for any assistance from other staff. It seems that the potential customer left without taking any samples, booking a property measurement or leaving any contact details. But it is unclear whether the purported potential customer was really such, or simply someone just browsing.

[15] The further evidence of Mr Pearce is that he asked another employee (at that time), Mr Mark Farrant, to spend some time with Mr Garner on product and pricing. Mr Farrant has had 40 years’ of installation and sales experience. Mr Pearce attests that Mr Farrant: “...*did not feel that John [Mr Garner] was suitable.*” However, the evidence of Mr Farrant is that:

At no time did Malcolm [Mr Pearce] advise me to discuss product, pricing and/or planning with John as he alleges.

[16] Mr Farrant is adamant that he did not have any significant time with Mr Garner after he was employed at PFL; neither did he give an opinion, then, that Mr Garner was not suitable for the role of salesperson. Mr Farrant says that he had knowledge of Mr Garner going back some 11 years, when he worked for him as a floor layer and later as a contractor. Mr Farrant attests that in September 2011, Mr Pearce told him that he was going to employ Mr Garner as a salesperson. Mr Farrant says that he advised Mr Pearce then that Mr Garner’s lack of hearing and his communication skills would create “stumbling blocks” for Mr Garner in a sales position. I found the evidence of Mr Farrant to be quite credible, but I also note

Mr Garner's evidence, whereby he says that Mr Farrant spent about 15-20 minutes with him on the afternoon of 18 October 2011 and there was a general discussion about the business. It appears that Mr Pearce may have exaggerated somewhat the role of Mr Farrant in having any influence on the subsequent conclusion that Mr Garner was not suitable as a salesperson, albeit it strikes me that perhaps it may have been wise for Mr Pearce to have listened to the advice of Mr Farrant, prior to employing Mr Garner.

The termination of Mr Garner's employment

[17] The evidence of Mr Pearce is that after Mr Garner had been employed for two days: *I decided at this point not to waste his [Mr Garner's] time or mine.*

[18] At 6.30am, Wednesday, 19 October 2011, Mr Pearce and Ms Boerboom met to discuss what should be done about Mr Garner. Their discussion involved the possibility of alternative positions to offer Mr Garner, as the business was "keen" to retain someone with his installation ability.

[19] Mr Garner arrived at work at 8:00am and was asked to meet with Mr Pearce and Ms Boerboom. The evidence of Mr Garner is that he was advised by Mr Pearce that he did not think Mr Garner would make it as a salesperson, due to not being aggressive enough in his approach to customers. And Mr Garner's speech and hearing would create a lack of confidence for customers. Mr Garner says that he was told also that he lacked product knowledge.

[20] The evidence of Mr Pearce and Ms Boerboom is similar to that of Mr Garner. It is commonly accepted that Mr Garner was offered two alternative roles: as an installer or as a remedial supervisor. The latter role involved checking jobs after completion by the installation team and fixing any problems prior to work being signed off. In regard to the first role, Mr Garner was not interested as he had given up installation, due to the physical demands. As to the second role, Mr Garner does not appear to have given this any serious consideration. Rather, he says that because of the decision that Mr Pearce had made, after only two days in the sales role, he had lost trust and confidence in Mr Pearce. As far as Mr Garner was concerned, the relationship had "completely broken down".

[21] The evidence of Mr Pearce is that Mr Garner informed that if he could not continue to work in the role as a salesperson, he did not want to work for PFL at all. It appears that there was some discussion relating to Mr Garner continuing to work for the rest of the week, but Mr Garner elected to finish up immediately and was duly paid for the three days, two of which he had worked and the Wednesday; being the day that he was informed that he was not suitable for the sales role.

Analysis and conclusions

Was Mr Garner dismissed?

[22] There is a dispute in regard to whether a dismissal occurred. Mr Garner says that he was dismissed from his role as a salesperson and because of the manner in which this was visited upon him, after only two days of employment, he had lost trust and confidence in Mr Pearce and hence was not interested in working at PFL in any other role. On the other hand, Mr Pearce says that while Mr Garner was unsuitable for the role of salesperson, the role of remedial supervisor would have provided suitable alternative employment and by turning down this role, Mr Garner chose to leave and hence he was not dismissed. And further, Mr Garner could have worked out the rest of the week in the sales role.

[23] While it could be said that Mr Garner was somewhat hasty in regard to rejecting the position of remedial supervisor, the fact remains that first thing on the morning of Wednesday, 19 October 2011, without warning or advance notice, and after only two days in his employment as a salesperson, he was informed that he was not suitable for the role. Mr Garner attests that he felt “bombarded” and that he was “shocked” having been employed for only two days. This was an understandable reaction on his part and it is hardly surprising that he initially reacted to the offers of alternative employment, as he did; albeit I will return to this aspect of matters later in this determination.

[24] The inescapable fact is that Mr Garner was dismissed from the position of salesperson on 19 October 2011. This was not a situation whereby the employer gave some notice of his observations and thoughts, regarding a possible course of action that was being contemplated. Rather, Mr Garner was simply informed that after two days, he was considered not to be suitable for the job he had been employed for. It follows that my finding must be that Mr Garner was dismissed.

Was the dismissal unjustifiable?

[25] The question of whether a dismissal is justifiable must be determined by the Authority on an objective basis. 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 circumstances¹.

[26] The reason given by Mr Pearce for dismissing Mr Garner from the salesperson position is that he was unsuitable "in a high volume, high pressure" sales role because Mr Garner:

- had poor measuring and planning skills;
- had illegible writing; and
- poor phone and people skills.

[27] Ms Boerboom also had concerns about Mr Garner in regard to his:

- personal appearance;
- total lack of product knowledge; and
- inability to communicate when asked direct questions.

[28] In his evidence to the Authority, in response to that of Mr Garner, Mr Pearce added that he believes that Mr Garner misled PFL about his ability to carry out the position. Mr Pearce says that Mr Garner was misleading in regard to:

- product knowledge;
- mathematical ability;
- customer relations;
- phone manner;
- self-motivation;
- work ethic; and
- time management.

[29] Mr Pearce reached all of the conclusions set out in the above paragraphs in the short space of two days. While it can be accepted that Mr Pearce is an experienced business person with high standards and expectations, it is difficult to accept that he could come to the conclusion that Mr Garner was unsuitable for the position in such a very short time. But even if it is accepted that Mr Pearce has such a shrewd eye or an uncanny ability to assess an employee in the time involved, he was not legally entitled to terminate the employment of Mr Garner in the manner that occurred.

[30] Mr Pearce and Ms Boerboom say that a trial period was discussed with Mr Garner. Mr Garner denies this. But even if Mr Garner is mistaken, there is no

¹ Section 103A of the Employment Relations Act 2000

written agreement about this and certainly nothing agreed to that even remotely approaches the requirements of s.67A of the Act. It provides that:

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer ...
- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –
 - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
 - (b) during that period the employer may dismiss the employee; and
 - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) **Employee** means an employee who has not been previously employed by the employer.

[31] Section 67B sets out the effect of a trial provision under s.67A with the general thrust being that, if an employment agreement contains a trial provision, providing the agreement has been entered into appropriately, an employee cannot pursue a personal grievance if they are dismissed during or at the cessation of that trial period.

[32] Alternatively, section 67 of the Act provides for probationary arrangements. Where the parties to an employment agreement agree that an employee will serve a period of probation, the fact of the probation and the period, must be specified in writing in the employment agreement. But of course an employment agreement was not provided to Mr Garner and hence the relevant provisions of the Act were not met.

[33] Mr Pearce defended the absence of an employment agreement by saying that there was to be a trial period before Mr Garner would be confirmed in the position, and before subsequently being offered an employment agreement. Under cross-examination by Ms Harvey, Mr Pearce stated that his practice was to have people work for "a couple of days" and if he is satisfied about their ability, an employment agreement is offered. Mr Pearce told the Authority that he accepted Mr Garner's word that he could "do everything" when he was interviewed. But this appears to have been a considerable leap of faith by Mr Pearce. He was well aware of Mr Garner's

background and hence it was most unlikely that he would have adapted from being an installer for many years, to being a competent salesperson, within the short space of two days. And having employed Mr Garner, Mr Pearce was obliged to ensure that some basic principles were observed in relation to managing Mr Garner's performance. These are clearly set out in *Trotter v. Telecom Corporation of New Zealand Ltd*,² a leading case in regard to the Employment Court (or the Authority) determining whether a dismissal for unsatisfactory work performance is fair. The Court stated that the assessment of whether a dismissal on the grounds of unsatisfactory work performance is justifiable, requires reaching a view on a number of questions:

- (1) Did the employer in fact become dissatisfied with the performance of his or her duties?
- (2) If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- (3) Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?
- (4) Was a reasonable time allowed for the attainment of those standards?
- (5) Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question of whether the employee had achieved or substantially achieved what was expected including:
 - (a) Using an objective assessment of measurable targets;
 - (b) Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;
 - (c) Listening to the employee's explanation with an open mind;
 - (d) Considering the employee's explanation and more favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her incompetence); and

² [1993] 2 ERNZ 659 at 681.

- (e) Exhausting all possible remedial steps including training, counselling and the exploration of redeployment.

[34] The above cannot be said to be a one-size-fits-all criteria as the nature and resources of respective businesses must also be factors. Nonetheless, if the criteria are applied in a commonsense manner to the circumstances pertaining to Mr Garner, the questions can be answered accordingly.

[35] First, it is obvious that after only two days (possibly even sooner), Mr Pearce did, in fact, become dissatisfied with the general performance of Mr Garner. But at that point, notwithstanding that Mr Garner had only been employed for such a short period, rather than informing Mr Garner of his dissatisfaction in regard to how he was performing and informing him of the reason(s) for the dissatisfaction, and what he required from Mr Garner, Mr Pearce simply informed him that he was not “cut out” to be a salesperson and was also critical of him in a number of respects, including his physical presentation.

[36] The harsh reality is that Mr Garner was given no opportunity at all to come to grips with what was an entirely new role for him. It may well be that Mr Pearce may have been proven to be correct in his assessment of whether Mr Garner was suitable for the role of salesperson, but it seems to me that a fair and reasonable employer would have at least allowed Mr Garner to “find his feet” in a new job before calling his performance into question. Returning to the *Trotter* criteria, it is patently obvious that firstly, Mr Garner was never given any information or constructive criticism of his work over the two days and, secondly, he was most certainly not allowed a reasonable time to attain the standards that Mr Pearce required. It also goes without saying that Mr Garner never had an opportunity to give an explanation in regard to how he viewed matters, let alone an opportunity to obtain further training or any other remedial assistance.

[37] While it has to be acknowledged that PFL is a reasonably small business and needs to maintain every possible edge in a difficult commercial environment, nevertheless, I am left to come to the inescapable conclusion that the manner in which Mr Garner was treated was not what a fair and reasonable employer could have done in the circumstances. It follows that the dismissal is found to be unjustifiable.

Remedies

[38] Having found that the dismissal of Mr Garner was unjustifiable and hence he has a personal grievance, pursuant to s.123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[39] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance and there has been lost remuneration because of the grievance, the Authority:

... must, whether or not it provides for any of the other remedies provided for in s.123 order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

(a) ***Reimbursement of lost wages***

[40] Mr Garner seeks an award of lost wages from 20 October 2011 until about two weeks before the Christmas break, i.e. approximately seven weeks' loss of income; after which he obtained some contracting work again. But it seems to me that there is an issue here as to the requirement of a grievant to mitigate any loss incurred. While I have found that Mr Garner was unjustifiably dismissed from the salesperson role, it has to be acknowledged that he was offered two alternative positions. The second position, as a remedial supervisor, was a role that Mr Garner was well suited for, given his experience as an installer and in which he was, apparently, held in high regard. The evidence for PFL is that while there was no opportunity to discuss such, Mr Garner would have been paid the same rate of pay. The evidence of Ms Boerboom is that she was surprised that Mr Garner did not accept this offer as it would have been, in her view, "a cushy number" and effectively could have seen Mr Garner managing the flooring installation for the business.

[41] It is most regrettable that Mr Garner did not take some time to contemplate matters further. He was informed that he was able to keep working in the sales position for the rest of that week: a further three days, and had he done so, with the opportunity to think things through further, he may have realised that the offer of the remedial supervision position was a reasonable option. Unfortunately, Mr Garner left suddenly without any discussion or exploration of this. It is also regrettable that more

effort was not made by Mr Pearce to persuade Mr Garner to think about that option further; when he drove Mr Garner home on his last day.

[42] While I accept that Mr Garner was shocked and upset about being removed from the sales position, after only two days in the job, without any proper process, I do not accept that it was reasonable for him to simply walk away from what appears to have been a reasonable offer of continuing employment. I conclude that Mr Garner effectively turned his back on a chance to continue in employment at the same rate of pay and by doing so, failed to mitigate his loss, with the effect being, that he is ineligible for any award of lost wages.

(b) *Compensation*

[43] Section 123(1)(c)(i) of the Act provides for the payment to the employee of compensation by the employer, including compensation for humiliation, loss of dignity and injury to the feelings of the employee.

[44] Mr Garner seeks an award of the sum of \$10,000 under this provision of the Act. His written evidence is that, upon being informed that he was not deemed suitable as a salesperson, he felt “bombarded and shocked” and could not believe he was being “sacked”. Mr Garner conveyed to the Authority that he felt embarrassed and humiliated and felt like a failure. Mr Garner (correctly) refers to being given no opportunity to defend the allegations against him. Mr Garner appears to have been particularly affected by the remarks made by Mr Pearce pertaining to Mr Garner’s hearing and speech. In his oral evidence to the Authority, Mr Garner said that he was embarrassed about losing his job as a salesperson, after such a short period of time, as he had been “in the trade” in the Rotorua area for 20 years and had a good reputation.

[45] I accept that how the dismissal was visited upon him, had a marked effect on Mr Garner, albeit Mr Pearce attempted to assuage this by offering alternative employment, but this was rejected. Taking into account all of the circumstances, I conclude that an award of \$4,000 is appropriate.

[46] In consideration of s.124 of the Act, I find that Mr Garner did not contribute to the circumstances that brought about the personal grievance, apart from his refusal to accept the alternative employment;³ hence this remedy should not be reduced.

Determination

[47] For the reasons set out above, I find that the dismissal of Mr Garner from the position of salesperson was unjustifiable. Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Pearce Flooring Limited is ordered to pay to Mr Garner the sum of \$4,000.

Costs

[48] Costs are reserved. The parties are invited to resolve that matter if they can taking into account the outcome and the usual daily tariff approach adopted by the Authority. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions in the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

³ This has been addressed by not awarding any loss of wages.