

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Xianghai (Oliver) Hao  
**AND** Driving Force Limited  
**REPRESENTATIVES** Applicant in person  
Li Liagren, Director of Respondent  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 28 September 2006  
**DATE OF DETERMINATION** 6 December 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] The applicant says he was unjustifiably dismissed on 2 May 2006 from his job as a sales representative for the respondent.

[2] The respondent company imports car and truck tyres from China for sale to local garages. It says that the applicant was not dismissed but chose to leave at the end of an unsuccessful trial period and accepted a "farewell" payment. Alternatively it says dismissal of the applicant was warranted because he had not met sales targets, spent too much time at the respondent's office and warehouse, did not provide adequate reports on his work and had ignored a directive not to call into the office each morning before starting visits to potential clients.

**Issues**

- [3] Issues to be addressed in resolving this problem are:
- Whether the applicant was on a "trial period" or permanently employed; and
  - Whether performance issues were properly addressed with the applicant resulting in a justified dismissal; and
  - If his dismissal was unjustified, what remedies, if any, are warranted after allowing for any contribution to the situation by the applicant?

**The law**

[4] In considering whether a dismissal is justified the Authority is required by section 103A of the Employment Relations Act ("the Act") to determine, on an objective basis, if the employer's decision to dismiss and how that decision was made were what a fair and reasonable employer would have done in the circumstances.

[5] A fair and reasonable employer concerned about unsatisfactory work performance would first clearly set out its expectations (including times when work should be done by), meet with the employee to ensure she or he understood those expectations, identify where the employee could get help or further direction if finding difficulty meeting those expectations, and set times

to review and reset expectations at reasonably regular intervals.<sup>1</sup>

[6] Before considering disciplinary action – whether a warning or a dismissal – a fair and reasonable employer would tell the employer of its concerns over poor performance and give a real opportunity for the employee to explain his or her conduct. That explanation would be considered with an open mind and if necessary further inquiries made before any disciplinary decision was taken.<sup>2</sup>

### **The facts**

[7] The applicant met the respondent's director Liagren Li after responding to a newspaper advertisement. He discussed getting involved in Mr Li's business but did not have enough funds to invest in it. Instead Mr Li offered the applicant a job working for the minimum statutory wage of \$9.50 an hour plus a mileage allowance for use of his own car on company business. He began paid employment on 25 October 2005.

[8] The two men discussed the prospect of the applicant later taking a share in the business. There was no written employment agreement, contrary to the requirement of s65 of the Act. Mr Li says the two men discussed reviewing the applicant's performance after six months and formalising the employment and business arrangements after that time. The applicant accepts that they discussed reviewing his performance in the future but denies any suggestion that a six month trial period was agreed.

[9] There is no satisfactory evidence that a six month trial period was agreed or that the applicant's employment was subject to a fixed term linked to performance in that period. Rather the evidence supports the view that he was employed on an on-going basis with the prospect that he would get a share in the business if Mr Li was satisfied with his performance. As Mr Li put it during the investigation meeting, he would "give him something" if he performed well.

[10] The applicant initially worked partly sourcing tyres – he was involved in arranging an additional supplier from China – and partly selling tyres. He also assisted in the warehouse with arranging and making deliveries of tyres and in the office with some administrative work. Mr Li was often absent on business trips abroad. He gave instructions to the applicant when he was in the country or passed these on through his wife Han Jianghua (Jenny Han) who was busy with another business operated from the same premises.

[11] The applicant and Mr Li discussed a sales target of \$100,000 a month. Sales were around \$75,000 a month when Mr Li bought the business in May 2005 but were less than \$60,000 a month by the time that the applicant began work in October 2005. In the following four months sales remained below this level.

[12] In February 2006 Mr Li directed the applicant to focus solely on sales work. The applicant was also told to start visiting clients from 8.30am each day rather than first coming into the office and going out later. Mr Li says he repeatedly emphasised the importance of sales to the applicant and "always pushed him to do better". Mr Li says that he also warned the applicant that if sales did not improve he would have to "shut the door", an expression he described as more polite than directly suggesting dismissal.

[13] Sales improved in March and the applicant was paid a small bonus in April to mark his success in securing a large order from one client in the previous month.

[14] The applicant accepts that he did not comply with Mr Li's instruction to make sales calls from the beginning of each days. He says he could not do so because he had other work which still needed to be done – particularly helping with unloading tyre containers and assisting with deliveries in order to keep existing clients happy.

---

<sup>1</sup> *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659 at 681-2 (EC).

<sup>2</sup> *NZ Food Processing IUW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, 45 – 46.

[15] In the week beginning 27 February the applicant's car broke down. He asked to be provided with a company car but was told one was not available. There was some discussion with Mr Li about why a car was provided to another employee referred to as "the Kiwi guy". Mr Li insisted that the applicant needed to get his own car repaired. He asked the applicant the next day whether his car was repaired.

[16] Without a car to make client visits the applicant remained in the office and warehouse doing other work.

[17] On 2 May Mr Li says that the applicant was at the warehouse with two other staff. He said to the applicant: "You are wandering in the warehouse, you want a car, it's your choice, either you go on the road or you can leave". He says that the applicant replied: "OK I'll go now" and talked of setting up his own business.

[18] The applicant says he was told "all of a sudden" by Mr Li that "I had better go home". He says that Mr Li told him: "My company is too small to hold you". The applicant says he was very surprised but remained calm and asked for his holiday pay which he was paid. By telephone a few days later he asked Mr Li for an extra week's pay because he had no money to survive on. Mr Li agreed to pay a further week's pay.

[19] After getting advice from a community law centre, the applicant filed a personal grievance application.

### **The merits**

[20] I find that this employment relationship did not end by mutual agreement at the expiry of a trial period. The applicant was sent away from the workplace on 2 May. That was a dismissal. The substantive issue for determination is whether the respondent properly put the applicant on notice that his performance was inadequate and his job was at risk.

[21] Mr Li's emphasis on the importance of sales, while repeated, was no more than the usual encouragement that would be expected of a business owner to a sales representative. There is no evidence that he attempted any systematic process of addressing the performance required of the applicant or assisted in identifying the measures needed to reach agreed targets. The applicant took the small bonus paid to him in April as a message that his performance was satisfactory. Otherwise the applicant appears to have largely been left to his own devices. He cannot deny not meeting the sales target but points to other factors such as pricing and competition in the market which affected sales. Better sales figures achieved by staff employed since his dismissal were partly because there were two people working on sales for several months. The applicant points to an improvement in sales after February 2006 when he was focussing solely on sales but says he needed more time to improve.

[22] None of these factors were properly considered by the respondent because Mr Li abruptly told the applicant to go home on 2 May. The applicant was not given a real opportunity, faced with the prospect of dismissal, to explain his performance or address the factors inhibiting him from meeting sales targets.

[23] Instead, in what appears to have been a "stand-off" over the provision of transport to make sales calls, Mr Li abruptly called an end to the employment relationship.

[24] I find that this was an unjustified dismissal. My view is unchanged by some arguments put forward by the employer after the event to attempt to bolster its action at the time. Those post-facto justifications are not relevant to whether the employer followed a fair process at the time of the dismissal and serve to confirm that concerns were not properly put to the applicant for explanation before he was sent away on 2 May.

[25] The respondent says the applicant did not provide written sales reports. However he did provide oral reports to both Mr Li and Ms Han. The respondent can scarcely complain about a

lack of written documentation when the company itself did not even meet its own statutory obligation for a written employment agreement (which could have clearly spelt out duties such as written sales reports).

[26] Ms Han criticises the applicant for causing some bad debts for the company by allowing credit to clients who later did not pay for tyres ordered. Some bad debt is a normal and inevitable incidence of a sales business.

[27] The circumstances of the dismissal were not remedied by what Mr Li called a "farewell payment". Firstly the applicant was entitled to ask for and receive his holiday pay. Secondly the additional week's pay he requested a few days later was neither sought nor offered on the basis of being a full and final settlement of any issues arising out of the employment relationship. The applicant was entitled to reflect on his circumstances and subsequently file a grievance.

### **Determination**

[28] The applicant was unjustifiably dismissed the respondent on 2 May 2006. He has a personal grievance which requires consideration of remedies.

### **Remedies**

#### *Lost wages*

[29] The applicant says he sought the assistance of an employment agency and submitted resumes to "many companies" to find a new job. He began work as a community consultant for a foreign exchange business on 20 July working 15 hours a week at \$20 an hour plus a mileage allowance. The new job, with a written employment agreement which he showed me, was for a fixed term until December. Apart from a few days work in a factory he has had no other work since his dismissal by the respondent.

[30] Allowing for all contingencies which might, but for the unjustifiable dismissal, have resulted in the termination of his employment I do not consider that the applicant should be awarded reimbursement of lost wages beyond three months.<sup>3</sup> Although denied a properly managed opportunity to improve, the applicant's performance, fairly reviewed, may well have resulted in termination of his employment within a few months. His sales were significantly below the \$100,000 monthly target. He may have sought other employment in any event from this low paid job that does not appear to have been particularly satisfying for a relatively young man with ambitions to run his own business.

[31] Accordingly, under s123(1)(b) and s128(2) of the Act the applicant is awarded three months ordinary time remuneration for wages lost as a result of the grievance. That amount is to be calculated on the basis of 12 weeks at the minimum wage operative from 27 March 2006 of \$10.25 an hour. Based on a 40-hour week that is \$410 gross a week, totalling \$4920. I have not allowed for any additional mileage allowances as the precise amounts received by the applicant is not readily discernable from the pay information provided by both parties and because he was not in fact making any client calls in the last week of his employment in any event.

[32] From this amount must be deducted two weeks of the earnings made by the applicant in his new job – that is \$600 – within that three month span (starting from the end of the additional week's wages paid to the applicant). The balance of the award for lost remuneration is \$4320 (gross).

[33] The applicant was also entitled to notice of his dismissal. In the absence of a written agreement, the amount of notice required is reasonable notice taking account of industry standards. For a sales representative with just over six months service I consider reasonable

---

<sup>3</sup> *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, 332 at [81] (CA).

notice to be one week. That is the amount of additional wages already paid by the respondent to the applicant so no further award on that aspect is required.

#### *Distress*

[34] The applicant also seeks an award of compensation for humiliation, loss of dignity and injury to feelings caused by the employer in unjustifiably dismissing him. He gave little evidence of distress arising from the manner of his dismissal but he was clearly placed in financial difficulties from suddenly losing his job and was dismissed abruptly in the presence of other staff at his workplace. This was inherently humiliating and would cause a loss of dignity. From having observed the applicant giving his evidence at the investigation meeting he appears to be a resilient individual suffering no on-going hurt from the circumstances of his dismissal. Accordingly I consider an award of \$2000 under s123(1)(c)(i) of the Act is the appropriate level of compensation for the distress caused to the applicant by his dismissal.

#### *Contributory conduct*

[35] In deciding remedies for a personal grievance the Authority must consider the extent to which the actions of the employee contributed towards the situation giving rise to the grievance and reduce remedies awarded accordingly. In this case I consider that the applicant's actions in two respects contributed to the situation giving rise to the grievance – and both have aspects of blameworthiness that warrant a reduction of remedies.

[36] Firstly he ignored an undisputed direction from the respondent to go directly to client calls each morning rather than calling into the office first. If the applicant did need to do other work vital to the business he should have discussed those matters directly with Mr Li or Ms Han. The failure to fully focus on sales obviously affected resulting orders and contributed to Mr Li's sense of dissatisfaction.

[37] Secondly he did not get his car repaired as Mr Li required. Instead a stand off developed which effectively amounted to the applicant refusing to make sales calls unless the company provided a car. The terms of his employment required him to provide his own transport, for which he was paid mileage. Mr Li may have overreacted in dismissing the applicant for remaining three days at the warehouse without making sales calls, but there was an element of provocation in the applicant's conduct.

[38] In these circumstances I consider it appropriate to reduce the remedies awarded to the applicant by fifty percent.

#### **Orders**

**[39] After allowing for the reduction of remedies for contribution under s124 of the Act, the respondent is ordered to pay to the applicant within 28 days of the date of this determination the following amounts as remedies for personal grievance:**

- (i) \$2160 (less PAYE) under s123(1)(b) and s128(2) of the Act as reimbursement of wages lost as a result of the grievance; and**
- (ii) \$1000 (without deduction) under s123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings of the applicant; and**
- (iii) \$70 as reimbursement of his fee for filing this matter in the Authority.**

Robin Arthur  
Member of Employment Relations Authority