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Horn v Kinetics Group Limited [2024] NZERA 256 (2 May 2024)

Last Updated: 7 May 2024

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI

ŌTAUTAHI ROHE

[\[2024\] NZERA 256](#)

3215019

BETWEEN GELBERT HORN

Applicant

AND KINETICS GROUP LIMITED

Respondent

Member of Authority: Antoinette Baker Representatives: Paul Mathews, for Applicant

Lisa Oakley, for Respondent Investigation Meeting: 25 January 2024 at Christchurch Submissions received: On the day

Last information received: 2 February 2024

Determination: 2 May 2024

DETERMINATION OF THE AUTHORITY

[1] The respondent (KG) delivers information technology (IT) and cyber security services to its clients. Mr Horn was employed by KG as a Senior Systems Engineer delivering various service delivery levels of on-site services to KG's clients from January 2022 until he left in mid-June 2023 after giving four weeks' notice.

[2] Mr Horn claims that during his employment, after a client rang a KG manager and complained about him, KG's decision to suspend him while it investigated the complaint

further, and its procedure to arrive at that decision and then resile from it without taking matters further, amounted to an unjustified action that caused him disadvantage in his employment. He says the action caused him significant distress at the time, that this continued for the remainder of his employment (just over four months) and that the distress continues. He claims \$21,000.00 in compensation under s 123(1)(c)(i) of the Act.

[3] KG denies Mr Horn's claim and the compensation sought saying that it followed advice about the suspension, that it had good reason to suspend, that it followed a fair process in relation to the suspension and that the suspension could not have had the effect claimed because it was short, on full pay and the investigation that had commenced did not result in any action taken.

The Authority's investigation

[4] An investigation meeting was held across a day. I heard evidence from Mr Horn, his wife, and a former employee of KG. For KG I heard from two managers involved in the suspension decision, Matthew Paterson, Tina Moulynox, and two other employees of KG. I asked questions of each witness, as did the respective representatives. I heard oral submissions from the representatives after the evidence was heard. I asked for further clarification from the parties, the last of which I received on 2 February 2023. I then reserved my written determination.

[5] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- a. Was the suspension decision justified and or the process used fair and, if not, did this unfairly disadvantage Mr Horn in his employment?
- b. Depending on the above, what if any compensation is Mr Horn to receive under [s 123\(1\)\(c\)\(i\)](#) of the Act?
- c. Is any remedy to be reduced for employee contribution under [s 124](#) of the Act?
- d. Should either party contribute to the other party's costs?

Was the suspension decision justified and or the process used fair and, if not, did this unfairly disadvantage Mr Horn in his employment?

[7] [Section 103A](#) of the Act requires the Authority to assess whether an employer has shown it was justified when deciding things that include a decision to suspend an employee from their work. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if in turn they have not had an unfair effect on the employee. Overall, the question is whether the employer acted in a way that a fair and reasonable employer could have done in all the circumstances at the time.

[8] The Employment Court¹ has confirmed that in deciding whether an immediate suspension is justified, a 'case by case' 'flexible and sensible' approach should be applied. 'Imminent danger to the employee or others, and an inability to perform safety-sensitive work' are two examples that might support an employer suspending without consultation. Ultimately, it says the test in each case is the fairness and reasonableness of the employer's conduct.

¹ *Graham v Airways Corporation of New Zealand Ltd* [\[2005\] NZEmpC 70](#); [\[2005\] ERNZ 587](#).

[9] Mr Horn's individual employment agreement did not provide any reference to suspension although KG has provided 'policy' documents about suspension that it says it followed together with a 'script' from an on-line employer information resource about suspension.

What likely led KG to decide to suspend Mr Horn and then lift the suspension?

[10] Mr Patterson received a phone call from what he explained was a 'key client' on the evening of 8 February 2023. Mr Paterson's evidence is that the 'key' client was one that accessed multiple services accounting for a significant part of KG's service delivery in the geographical area that Mr Horn was employed to work in. Mr Patterson says that when the client (the owner of the business) called him, he was very concerned about what the client told him in relation to unhappiness about Mr Horn's service delivery. He says he had some years of business relationship building and trusted that person's judgment about staff. Mr Paterson's evidence includes that the complaint included the client saying to him that 'all of this was contributing to [KG] potentially loosing [the client] as a customer which was really concerning.'²

[11] At the time of hearing from the client in the phone call, I find it likely based on his own evidence that Mr Paterson formed a view that what the client said about what Mr Horn had done was correct.

[12] Ms Moulynox says Mr Paterson rang her after the client contacted him and says that he was 'upset' not just because a client had complained but '*especially* given the size of this client for [KG]'. I find it likely based on the

explanations from Mr Paterson and Ms Moulynox that the prime driver here for KG was a concern it would lose a significant client's business.

[13] The next morning, two steps were taken by KG.

2 Brief of Evidence, Mathew Paterson, 27 October 2023 at paragraph 4.

9 February 2023 Mr Paterson emails the complainant client to verify complaint content

[14] At 9.19am Mr Paterson emailed the complainant client thanking them for their previous night's phone call 'to discuss your poor service experience with' KG. He thanked the client for the 'frank' discussion' and apologised for 'letting you down.' Mr Paterson included that:

I was shocked to hear of [Mr Horn's] behaviour, and I see it as a case of serious misconduct and will be addressing it with urgency.

[15] In the above email, Mr Paterson attached his summary of the client's complaint and asked the client to reply with verification that it was an 'accurate reflection of our discussion.' The summary included that the client said that Mr Horn had talked negatively to the client about KG and 'regularly' spoke this way to the staff. One specific was recorded referring to Mr Horn making a comment about the managing director of KG in response to the client questioning the cost of some KG work. Further it was recorded that when Mr Horn was on site he 'did not communicate well with [the client's staff] and that he was 'often appearing to be busy working on other customer issues'. One specific was recorded in relation to him not being willing to look at a printer while on site because he said 'he was not here to do that' but then when asked by the client directly he did have a look and it took about '5 minutes to fix.'

[16] The email from Mr Paterson to the client ends with,

I am disappointed that this behaviour has contributed to losing you as a longstanding [KG] client and as discussed, we will provide a professional handover to your new Service Provider.

[17] I note here that other evidence shows the client indicated they may leave. The client as I understand it did not leave. Mr Paterson did not hear back from the complainant client by email until the 13 February 2023. I will return to that reply later.

9 February 2023, Ms Moulynox invites Mr Horn to an 'urgent' meeting

[18] The second thing that KG did that morning was to invite Mr Horn to a meeting. Mr Horn received an electronic meeting invite from Ms Moulynox asking him to attend an 'urgent' online meeting with her and Mr Patterson. Both managers worked in another part of the country to Mr Horn and online meetings were common. Ms Moulynox was Mr Horn's manager for human resource issues, Mr Paterson was Ms Moulynox's direct manager. Ms Moulynox did not give a reason to Mr Horn for the meeting. Ms Moulynox's written evidence is that after she had been called by Mr Paterson on the evening before about the client complaint and they decided to have an 'informal' meeting with Mr Horn the next morning. She says that '[Mr Horn] was generally good to work with a good employment record, so we didn't want to jump straight to a more formal discipline meeting and thought an informal meeting would be more appropriate to discuss the complaint'.

[19] Mr Horn says he did not think anything of the meeting invite's reference to 'urgency' because he thought it was likely about a particular client (not the one who he later discovered had complained) wanting progress on their work, not something out of the ordinary. He had to rearrange his commitments and the meeting occurred mid-afternoon that same day through online audio. Mr Horn says that when he received a communication from Ms Moulynox just before the meeting was due to start asking him to move into a meeting room and not to sit at his open plan desk, he felt something was unusual.

9 February 2023 afternoon meeting

[20] Mr Paterson's evidence is that he 'opened' the meeting with an explanation that they 'had received a pretty

serious customer complaint.' Mr Paterson says he then proceeded to put 'each item' to Mr Horn 'verbatim' from the email (referred to above) that he had sent that morning for verification to the client.

[21] It is not in dispute that Mr Horn became very distressed and cried a lot during the meeting. I find based on the explanations of all parties that his responses to the 'verbatim' list

of 'allegations' that they were brief, and that Mr Horn denied the complaint and said he thought it was personalised against him and would not be upheld. I observed that Mr Horn became distressed in the Authority investigation meeting recalling his evidence. He explained to me that he is a very emotional person. He explains his distress in the 9 February meeting and afterwards was because he was fearful of losing his job due to visa requirements. He referred to recalling words – 'serious' and bringing the company into 'disrepute.' While KG's two managers both say Mr Horn was given the opportunity during the meeting to get assistance given the level of distress he exhibited they also both gave oral evidence that they needed to continue with some 'urgency'. I will return to the reasons given for this 'urgency' below.

[22] The meeting was not recorded. I am satisfied that the meeting was relatively short. KG's reason for not taking notes or recording is because the meeting was 'informal' and not 'disciplinary'. KG's evidence varies about when the suspension was proposed and or consulted about. Mr Paterson says it was during the 9 February meeting that consultation about the suspension occurred. Ms Moulynox says it was in a call later that day that she consulted with Mr Horn about the suspension. Mr Horn varied from saying it wasn't in the meeting or that he did not recall. I find a likelihood Mr Horn is hampered with recall given the emotional state he was in during the meeting.

[23] Mr Horn went home after the meeting. Mrs Horn gave evidence that he was in a very distressed state when he came home.

9 February 2023, Ms Moulynox calls Mr Horn

[24] Approximately 90 minutes after the meeting ended and when Mr Horn was by then at home, Ms Moulynox rang him. In that phone call which I am satisfied lasted a short time she told Mr Horn he was suspended on pay pending KG's investigation of the client complaint. I am satisfied that Mr Horn's responses were minimal including something like, "It is in God's hands". Ms Moulynox says he had calmed down by the time of the phone call.

9 February 2023, the suspension letter

[25] A 'suspension' letter of just over two pages long, which I am satisfied had been prepared before the above phone call, was then emailed to Mr Horn. The suspension letter included that he was suspended from the workplace immediately, on full pay with continuity of employment and continued use of a company car. Mr Horn was to remain available to answer any queries from Ms Moulynox on his work mobile device but was instructed not to come to the workplace or contact other staff or contractors unless authorised by Ms Moulynox.

[26] The suspension letter included that 'further to' the meeting that morning, KG had concerns regarding Mr Horn's conduct in his role that needed to be 'investigated more fully.' It then included:

In order to manage this investigation and allow you the appropriate time free from distraction to respond to these allegations, we would like to confirm the suspension proposal discussed with you today.

[27] The letter goes on to set out that there were 'concerns' from the client complainant although does not point to any detail in the letter referring to them having been 'discussed with you today':

...which we discussed with you today. We will provide you with a copy of this complaint and all relevant information relating to the investigation in a follow up meeting invitation letter. The nature of the complaint indicates that you may have brought [KG] into disrepute with

this client, due to their recent decision to cancel their managed services agreement with [KG].

[28] The letter continues that if the allegations are substantiated it may amount to serious misconduct in that Mr Horn may have breached his employment agreement and company policy with one of the potential outcomes being termination of employment.

[29] Further the suspension the letter included:

In the meantime, because of the seriousness of the allegation we believe that it would be appropriate for your employment to

be suspended for the period of the investigation, which we estimate could take up to 7 days. We will not keep you suspended for longer than is necessary for us to carry out the investigation and to decide on action to be taken, if appropriate.

[30] KG then included a direct quote from the [KG] Workplace Investigations policy: To facilitate an investigation, Kinetics Group may suspend the employment of any employee which the investigation takes places. The possibility of suspension will be discussed with the employee (and the employee's representative(s) if the employee wishes) before a decision

to suspend employment is made.

The employee's views on the possibility of suspension will be taken into account before a decision on suspension is made. The employee's normal remuneration will be continued during any period of suspension.

The suspension will last only so long as needed for the employer to conduct a careful and reasonable investigation.

[31] The reason given for the suspension is then explained further:

...your feedback on the suspension proposal was that the client has a grievance with you that is personal in nature, and that you do not believe the allegations will be upheld. We have considered your perspective and have decided in the circumstances to proceed with the suspension which we believe will ensure that there is no interference in the investigation process and will provide you with adequate time and opportunity to respond fully given the seriousness these claims. Your suspension does not mean that we have already decided that you have done or not some an action or behaviour that is considered misconduct or serious misconduct.

13 February 2023

[32] The client complainant replied to Mr Paterson's request to verify his emailed points from their discussion (points already put to Mr Horn 'verbatim' on 9 February 2023). The client says:

I had to really contemplate your email [the request for verification], as going down the line of serious misconduct is of course very serious. I didn't contemplate where my honest discussion with you would lead to from your perspective and I was hesitant in being formally part of any proceedings. ... However, what I told you was the truth ...

[33] The client then adds a few 'slight' additions to the words Mr Paterson had sent that I summarise as:

- the client was not sure when Mr Horn may have said he was being chased by another business and thought he should have worked for them rather than KG but the client indicates it was probably near the beginning of the times that Mr Horn came on site to provide services;
- that in relation to when Mr Horn 'regularly' complained about KG to the client's staff, a specific was provided which was that 'most recently' Mr Horn had complained (no specifics given) about KG in a meeting and that a "[specific person]" attended;
- that the incident where the client raised concerns about costs included Mr Horn referring to a decision of KG's to sell some intellectual property;
- that the issues regarding Mr Horn saying he was not there to look at the printer when asked to do this on a site visit was because he said to the client's staff member that 'it would interfere with his lunch break.'

13 February 2023 invitation to disciplinary meeting

[34] KG invited Mr Horn to a disciplinary meeting and provided him with the same email content that Mr Paterson had read aloud to him at the meeting on 9 February but with red font additions for the above-mentioned client complainant's additions.

15 February 2023, the suspension is lifted

[35] Mr Horn remained suspended on full pay for five working days after which KG lifted the suspension. This was communicated between representatives. KG's reason to lift the suspension was because Mr Horn's representative could not be available for a disciplinary meeting within the timeframe of the 7 days that KG had predicted for its

investigation and because 'it is not practical for [Mr Horn's] suspension to continue indefinitely and that KG 'would like [Mr Horn] to return to work effective immediately'. KG says it lifted the suspension because it was concerned about how long it could have Mr Horn off work and because his representative was not available to meet within the short time frame it expected to investigate. The conditions about Mr Horn's return to work were that he was to be based in his home office and was not to have contact with the complainant client. It sought an 'undertaking' that Mr Horn 'will engage with all other [KG] customers in a manner that is professional during this time.'

[36] Mr Horn's response the same day through his representative was to confirm he would return to work but would not give any 'reassurances.' A personal grievance for disadvantage was raised on the basis that the process leading to the suspension (not being told the reason for the initial meeting or being able to have a support or representative) and the reason for the suspension itself (that Mr Horn may interfere with the investigation process) was not substantively justified.

[37] On 21 February the parties' representative exchanged emails, KG refuted the disadvantage claim. A response for Mr Horn was that there was no basis for the suspension and that he could not have confidence in the investigation process going forward.

Disciplinary meeting

[38] Having returned to work, Mr Horn attended a disciplinary meeting with his representative after which KG communicated it would be taking no further action against him in relation to the client complaint calling it 'unsubstantiated.'

Was the suspension decision justified and or the process used fair and if not did this unfairly disadvantage Mr Horn in his employment?

[39] I am satisfied that KG's policy includes a discussion with an employee before it makes a decision to dismiss. Even without this the principals of natural justice would require some form of consultation before making a decision to effectively expel an employee from the workplace even on full pay unless, as noted above, there was some sort of urgent risk usually in the context of safety. I find no evidence of that sort of high-risk here that would justify an immediate suspension without consultation.

[40] Even if that was the case, I have no evidence to show me that there was a 'high risk' that Mr Horn would interfere with an investigation process other than Mr Paterson's explanation of his senior level access to the IT systems of the company, systems I accept form the core of the business service delivery. Ms Moulynox's evidence that the 9 February meeting was 'informal' was because up to then Mr Horn had been a good employee. I accept that both were surprised at the way Mr Horn reacted in the 9 February meeting. Mr Paterson says that when he put the client complaint to Mr Horn he had an almost immediate reaction which in oral evidence he described as 'disproportionate'. Ms Moulynox when pressed by me in her oral evidence described her view that the reaction from Mr Horn was 'unhinged' which she then explained was because he was 'agitated with his arms' and she could 'sense anger'. It is common ground after Mr Horn became distressed.

[41] What KG appears to have concluded from Mr Horn's reaction in the 9 February meeting is that this supported it should remove him from the workplace while it investigated

because it was concerned he may interfere with it investigation about the client complaint. Mr Paterson also explained the primary concern was about its biggest client going elsewhere. This was in the context of forming a view that the client's explanation could be relied on even before he had spoken to Mr Horn. The Employment Court has referred to the importance of checking the veracity of complaints about employees coming from outside the workplace.³

[42] Standing back from the above I am satisfied that KG did not genuinely consult about the suspension. Its concerns that Mr Horn would interfere with its investigation appear to have been based on a mix of his senior level 'god like'⁴ access to IT systems and or his state of mind based on his reaction when told about the elements of the complaint, a meeting that Mr Horn had no notification about as to its purpose. At the very least, an alternative to being expelled from the workplace so suddenly could reasonably have been the one proposed by KG only a short time later being no contact with the client, and a work from home office. These were not discussed and reasonably could have been.

[43] KG's actions were in circumstances where I accept it sought advice and followed a 'script'. How it implemented any advice or followed a 'script' was a decision made by those carrying out the process. While a process does not have to be perfect, a fair and reasonable employer in the circumstances could have reasonably put a 'serious' complaint to an employee with more care, reasonably have stopped a meeting where an employee's reactions were so emotional they likely impeded reliable answers, reasonably have been seen to impeded reliable answers, and then not relied on these minimal answers to form a view that the employee was a high risk in the workplace because of his emotional state in that meeting. I find here that KG fell well short of actions that were justified and they had an impact on Mr Horn in the workplace being suddenly removed from his senior role in a rapid process with no consultation about what was another option implemented at the employer's instigation only less than a week later.

3 *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport Ltd (t/a Stagecoach New Zealand)* [2002] EMC Wellington WC 36/02.

4 Oral evidence of Mr Paterson at the investigation meeting.

[44] Based on the above I find Mr Horn was disadvantaged in his employment because of the procedure and the substantive reasoning for the suspension from employment on full pay for 5 working days.

Depending on the above, what if any compensation is Mr Horn to receive under [s 123\(1\)\(c\)\(i\)](#) of the Act?

[45] Mr Horn claims \$21,000.00 in compensation. For Mr Horn I was referred to *Innovative Landscapes (2015) v Popkin* [2020] NZEmpC 40; [2020] ERNZ 55. That case involved redundancy which the parties agreed was substantively justified given the financial situation of the employer. However, the procedure of the redundancy was poor and the compensatory award of \$15,000.00 was considered appropriate given the impact on the employee who the court found 'felt stressed and uncertain in respect of what was happening and the bluntness of [the employer's director's] approach'. Here however, I need to consider whether the impact Mr Horn says he suffered were caused by the unjustified actions of KG. KG says that could not have been the case.

[46] I find here there was a bluntness of approach particularly in the way Mr Horn was likely put on the back foot in the 9 February 2023 meeting and even if he had not reacted in the way he did, views had been formed that the client complaint was likely true, and a rapid process eventuated that left Mr Horn likely very shocked. However, any uncertainty about his continued employment (something Mr Horn says was context for his distress) was not long lived. He returned to the workplace after five working days and remained on full pay throughout.

[47] Mr Horn gave evidence that the effect of KG actions in relation to the suspension have been long lasting and, the way he and Mrs Horn described it, had a serious emotional impact on him and the family. However, while Mr Horn told me he believed this was all caused by the suspension and what happened subsequently, the latter was only generalised in his claim and evidence. I accept his evidence and Mrs Horn's evidence of how he does not cope with sleeping and his emotional wellbeing.

[48] However, he says this continues and attributes it to the suspension. I do not find that I can reasonably conclude this was all caused by the actions of KG in relation to the grievance. I except for the Horns there has been a level of challenge for them life in the progression of their decision to leave their homeland and immigrate to New Zealand. That context however cannot reasonably be sheeted to KG's actions in terms of the high compensatory award he seeks.

[49] I accept there would have been an element of humiliation to Mr Horn being a senior employee in the workplace and suddenly suspended. I find a likelihood this all happening so quickly that others in the workplace were not likely managed in terms of what they knew or needed to know. KG says Mr Horn deliberately told others when he was directed not to. I prefer Mr Horn's evidence that he found it difficult to answer people asking what was happening. I accept this caused humiliation to Mr Horn and stress about the uncertainty at the time.

[50] After about four months Mr Horn resigned and obtained employment elsewhere. He does not bring a lost earnings claim in relation to his grievance. He did not bring a claim of constructive dismissal. Therefore, to the extent he was disadvantaged I have no evidence this impacted directed on him financially and I am not prepared to consider compensation for reasons that the effect of the suspension led to his resignation.

[51] Considering all of the above I find a reasonable compensatory award is \$4,000.00.

Is any remedy to be reduced for employee contribution under [s 124](#) of the Act? Should either party contribute to the other party's costs?

[52] I heard evidence from others in the workplace at the time of Mr Horn's suspension. This was in relation to the claims by KG that Mr Horn had breached the terms of his suspension in that he told others about the investigation. Mr Horn says he did not tell anyone but was getting approached after he was suspended. Standing back from this evidence I do not

find that Mr Horn likely told others about the suspension or the investigation. His own line manager did not seem to immediately know about it but observed employees in the open plan office gathering around a computer apparently picking up that something had happened. A young employee observed this but could not be clear what was said. In short I do not find this evidence assists me to consider that Mr Horn should have his remedy reduced because he contributed to the circumstances of his grievance.

[53] Accordingly, I have not reduced the remedy awarded under [s 24](#) of the Act.

Summary

[54] Kinetics Group Limited is to pay Gelbert Horn \$4,000.00 in compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[56] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Horn may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum KG will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[57] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors require an adjustment upwards or downwards.⁵

Antoinette Baker

Member of the Employment Relations Authority

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

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