

NOTE: An order for the payment of  
a penalty appears on p 10 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 332/08  
5094834

BETWEEN

VINCENT JEFFERSON  
Applicant

AND

ENDURING SALES LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: V Jefferson, in person  
L Campbell, Counsel for Respondent

Investigation Meeting: 7 July 2008

Additional information received: 25, 28 July, 15, 20 and 22 August 2008

Submissions received: 15 September 2008 from Applicant  
8 September 2008 from Respondent

Determination: 23 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Vincent Jefferson says his former employer, Enduring Sales Limited (“ESL”) dismissed him unjustifiably. He also seeks penalties for a failure to provide a written employment agreement and for breach of good faith.

[2] In the statement of problem Mr Jefferson had cited another company, Eldersafe Limited, as the employer party to his employment relationship problem. However during the investigation meeting he accepted that ESL was the employer party and ESL was formally substituted as the respondent.

[3] ESL denies there was a dismissal. It says Mr Jefferson was employed as a casual worker, and there was no work available for Mr Jefferson at the relevant time. Further, it says Mr Jefferson was provided with a written employment agreement and denies any failure to act in good faith.

### **Was Mr Jefferson employed as a casual employee**

[4] ESL carries out telesales work for its associated companies. According to the sole director and shareholder, Nigel Loy, ESL employs telemarketers on what was referred to as a part time casual basis. A telemarketer's job is to contact potential customers and arrange appointments for Mr Loy's 'distributors' or other contracted sellers of relevant products to call on the customer and, ultimately, effect a sale. Mr Loy gave two reasons for what he called the part time casual nature of the telemarketer's position. The first was that telemarketers themselves have other interests and prefer not to be committed to regular hours, while the second was that the volume of available telesales work varies depending on whether the distributors are busy and on the availability of products to sell.

[5] Telemarketers also work at varying times of the day, depending on the market being targeted. One of Mr Loy's other companies, Eldersafe Limited, offers home security products for the elderly and infirm. The elderly are generally available between 8.30 and 11 am.

[6] In April 2007 Mr Jefferson was working in another telemarketing position when one of his colleagues suggested he approach ESL. Mr Jefferson did so, speaking in the first instance to Divia Claudy, the call centre manager. Ms Claudy is no longer employed by the company and was not available to give evidence.

[7] According to Mr Jefferson, his first interview was with Ms Claudy. Mr Jefferson told Ms Claudy that his hours of work at the other position were afternoon hours, and he had heard ESL sought someone to work in the mornings. He asked if he could work between 8.30 am and 1 pm rather than the more usual 1.30 pm. Ms Claudy agreed.

[8] There was a second interview with Mr Loy. Mr Loy said the interview occurred on the day Mr Jefferson started work, 6 April 2007, and that Ms Claudy had already indicated Mr Jefferson was to be employed.

[9] It was common ground that there was a discussion about the nature of the position and the product being sold. It was also understood that Mr Jefferson was available only between 8.30 am and 1 pm.

[10] According to Mr Loy, Mr Jefferson was told the position was casual, and the rate of pay was \$20 per hour inclusive of a loading for holiday pay. Mr Jefferson denied any mention that the employment was casual or that holiday pay was included in the hourly rate. Mr Loy also said there was a discussion about the target number of appointments to be secured from the telemarketing contact, and that telemarketers could leave early if they had made their targetted number of appointments. Mr Jefferson denied this.

[11] For reasons to be discussed in more detail in the remainder of this determination, I prefer Mr Jefferson's evidence on matters involving credibility. Here Mr Loy's references to Ms Claudy led me to consider it likely that, at best, he assumed Ms Claudy had addressed the matters of the kind he now says he addressed.

[12] There was further conflict in the evidence concerning whether Mr Jefferson was given a written employment agreement. Mr Loy said a written agreement had been prepared, he had the agreement with him during the interview, and the terms were discussed. The agreement had been prepared from an electronic template, into which Mr Jefferson's name was inserted before the document was printed. The agreement was given to Mr Jefferson to take away and sign, but Mr Jefferson did not return a signed agreement. Mr Jefferson denied all of this.

[13] No-one produced the document allegedly discussed that day. The electronic version of what was said to be the template was provided after the investigation meeting. The version provided to the Authority had another employee's name on it, although I was told Mr Jefferson's name was incorporated in the document provided to him. The electronic record also shows the document provided to the Authority

was printed on 12 February 2007. That is not a record I would expect to see if an amended version of the document was printed out and offered to Mr Jefferson in or about early April 2007.

[14] An employment agreement with Mr Jefferson's name on it was sent to him by email on 11 May 2007, after his alleged dismissal. The attached agreement was saved in a pdf format immediately before it was sent. That information does not necessarily mean the agreement itself was created for the first time immediately before it was sent. However my request for evidence of the prior existence of an agreement in some other format has not resulted in the satisfactory production of such evidence.

[15] As a result I am not persuaded that Mr Jefferson was given an employment agreement in early April. This finding was a factor in my decision to prefer Mr Jefferson's overall account of his interview with Mr Loy.

[16] I turn now to the remaining evidence bearing on whether Mr Jefferson was a casual employee.

[17] While I might accept that in general telemarketers are employed on a casual basis for the reasons outlined, evidence particular to Mr Jefferson's employment indicated he was expected to work such regular hours that his employment was in reality more part time than casual. Mr Jefferson was expected to report to work on weekdays from 8.30 am to 1 pm. These hours had been discussed with either Ms Claudy or Mr Loy, or both. Mr Jefferson had the day off on 23 and 30 April, and on occasion he left early for reasons of his own. Although the timesheets did not record this, Mr Loy said Mr Jefferson also arrived late from time to time. Mr Loy commented adversely on this attendance.

[18] Evidence from Ms Claudy, or more fulsome explanations from Mr Loy, might have cast matters in a different light, but no such evidence was available.

[19] Overall, Mr Jefferson appeared to have been treated as a part time employee. I characterise the true nature of his employment accordingly.

**Whether Mr Jefferson was dismissed**

[20] Mr Loy became concerned because the rate at which Mr Jefferson's appointments were converted to sales was low. He sought to discuss this with Mr Jefferson, and said he did so on 8 or 9 May 2007. Mr Jefferson responded by saying he was not clear about what he was expected to achieve, although he also said he was not experiencing any difficulties and did not believe he was performing poorly.

[21] Mr Loy said he met again with Mr Jefferson on 10 May, this time to discuss the need for Mr Jefferson's services. Mr Jefferson said this matter was incorporated in the discussion about his performance, and that the entire discussion occurred on 10 May. He produced a file note he had made. The note was made several days later at the very least. Otherwise I have no reason to consider it inaccurate.

[22] Mr Jefferson's account of the discussion on 10 May was that it occurred in two parts. During the first of these, he told Mr Loy he was unsure of what was required of him in terms of targets to be met, and of which clients qualified for appointments with a sales representative. He told Mr Loy that Ms Claudy had not communicated her requirements clearly. I consider it likely this was the conversation Mr Loy said occurred on 8 or 9 May.

[23] The second part of the discussion occurred later the same day. It addressed in more detail the rate at which appointments Mr Jefferson made were converted into sales, before turning again to the criteria Mr Jefferson applied when deciding who 'qualified' for an appointment.

[24] During the discussion Mr Jefferson and Mr Loy disagreed about whether Mr Jefferson was acting on Ms Claudy's instruction on the matter of who 'qualified' for an appointment. The disagreement ended with Mr Loy telling Mr Jefferson he 'had to go'. Mr Jefferson asserted his competence again, at which point Mr Loy said he would speak to Ms Claudy and 'they would call me back the next day if they needed me.' Mr Jefferson requested a dismissal letter, and Mr Loy responded by saying he did not need to provide one as Mr Jefferson was 'part time'.

[25] Mr Loy's account of the discussion about the need for Mr Jefferson's services was that he told Mr Jefferson he wanted someone who was available in the afternoons and evenings. He also said the 'campaign was changing'. He said at the investigation meeting that this was a reference to the termination of an arrangement involving certain distributors, with an associated reduction in the number of telemarketers needed to arrange appointments. The distributors in question were said to have been engaged by a company contracted to sell Eldersafe products.

[26] Mr Jefferson denied Mr Loy's account.

[27] Mr Jefferson left the premises and was not offered further work after 10 May. By emailed message of the same date he said he would be raising a personal grievance concerning his dismissal. Mr Loy replied on 11 May, attaching the employment agreement to which I have referred, and saying:

"Enduring Sales has not dismissed you. The nature and term of your employment with Enduring Sales Limited are part time casual and as discussed with you Enduring Sales will contact you when we require you."

[28] If Mr Jefferson was a true casual employee, and the discussion of 10 May amounted to advice from Mr Loy that, for genuine reasons, no work was currently available for Mr Jefferson, then it could be said there was no dismissal. However I was not persuaded Mr Jefferson was a casual employee. Moreover, even if this conclusion is wrong, I prefer Mr Jefferson's account of the 10 May discussion. I construe the exchanges as he recorded them as a dismissal because of dissatisfaction with his performance, followed by an attempt after the event to rely on the allegedly casual nature of his employment.

[29] I was influenced in reaching this conclusion because of the thin evidence and lack of fulsome explanation of why there was no further need for Mr Jefferson's services, as well as the lack of detail regarding the changed 'campaign.'

[30] I attempted to obtain better information about the changed campaign, and the reasons why there was no further need for Mr Jefferson's services. Information

provided after the investigation meeting, in the form of an emailed message from another company employee, indicated initially that a dealer named CYD Limited terminated an agreement to provide sales representatives in 'April/May'. That company provided 8 sales representatives. Apparently it was the company to which Mr Loy was referring - but could not name - during the investigation meeting. A second dealer operating in the Bay of Plenty and Coromandel area was also said to have terminated an arrangement. I sought further and better information, which indicated 'wrap-up' arrangements were being discussed as early as March. If so, the notice of termination of the respective agreements and arrangements must have been given in or before March.

[31] None of this was explained. Moreover, in association with Mr Loy's oral evidence on the point and again in subsequent exchanges with the parties, I had asked for copies of the formal notification of termination of the arrangements in question. I was provided only with the emailed exchanges referred to above. They did not meet my request, or answer the further question about how this change affected the work available to Mr Jefferson.

[32] Mr Loy also said at the investigation meeting that he did not believe any new telemarketers were taken on during the period of approximately 6 weeks after Mr Jefferson's employment ended. He was asked to confirm this. Information subsequently provided indicated that four telesales staff were engaged during that period, while 6 staff ended their engagements. Mr Jefferson was the first of the 6 who 'finished'. All 6 were said to have worked in 'telesales – medical alarms'. However the four who were engaged were said to have carried out the same work as the 6 who 'finished'.

[33] The above information raises a question about why, if these four people were doing the same work, Mr Jefferson's engagement had to end. I had indicated to the parties that the figures required further explanation. I received a response in respect of the 6 who finished, but that begged the question of why four more people were engaged to carry out the same work while Mr Jefferson was not retained.

[34] In conclusion, I do not accept that – even if Mr Jefferson was a casual employee – no work was available for him because the ‘campaign was changing’. He was told he ‘had to go’, with the unstated reason being dissatisfaction with his performance. He was dismissed.

### **Whether the dismissal was justified**

[35] In the light of the above finding regarding the reason for the dismissal, the circumstances amount to an unjustified dismissal regardless of whether Mr Jefferson was a casual employee or a part time employee.

[36] Concerns about Mr Jefferson’s performance were drawn to his attention, but the possibility that his employment would not continue (or he would not be offered more work) if the matters of concern were not remedied was not. Further, Mr Jefferson was not given an opportunity to improve. There is an obligation at least to take steps of that kind before terminating employment for poor performance.

[37] For that reason I find Mr Jefferson’s dismissal was unjustified.

### **Remedies**

[38] Mr Jefferson obtained full time employment on 18 June 2007. I asked him to quantify any loss of remuneration. He said he was without the income from ESL for a period of 5 weeks. He also said he worked 35 hours per week and from 1.30 to 8 pm from 10 May until the end of May. He did not work for a period of three weeks before he obtained another full time position.

[39] Mr Jefferson said his other employment as a telemarketer was part time up to the time of his dismissal. The information he provided suggests he was able to move to a position resembling a full time position immediately upon the loss of his employment with ESL. Accordingly I am not persuaded he suffered any loss of remuneration in May. Finally I am not persuaded that any loss of remuneration after the end of May flowed from his dismissal by ESL.

[40] Therefore there will be no order for the reimbursement of lost remuneration.

[41] Mr Jefferson also seeks compensation for the injury to his feelings resulting from his dismissal.

[42] I accept there was some injury to feelings, and that Mr Jefferson was shocked and upset at his dismissal. He is entitled to compensation for the injury resulting from his personal grievance. However it is relevant that Mr Jefferson had not been employed by ESL for long, and retained employment of a similar kind with another company. Further, some of the injury to his feelings amounted to frustration with Mr Loy's conduct after the dismissal and anger because of his view that Mr Loy was lying.

[43] ESL is therefore ordered to compensate Mr Jefferson for injury to his feelings in the sum of \$3,000.

### **The claims for penalties**

#### 1. Failure to provide written employment agreement

[44] The obligation to provide a written employment agreement, as relied on in this claim, is contained in s 63A(2) of the Employment Relations Act. It concerns the procedure to be followed when bargaining for terms and conditions of employment. The provision reads:

“(2) The employer must do at least the following things:

- a. provide the employee a copy of the intended agreement, or part of the intended agreement, under discussion;
- b. ...”

[45] Section 63A(3) provides for a penalty for failure to comply with s 63A.

[46] I accept ESL had a template for its telemarketers' agreements and that in general it individualised the template and provided the resulting agreement to its employees. Whether it did so here has been disputed. I have concluded that, at best,

there was a failure in communication between Ms Claudy and Mr Loy which led to a failure to provide Mr Jefferson with a written employment agreement.

[47] If there was an oversight, and it was acknowledged, I might have exercised discretion against making an order for the payment of a penalty. However Mr Loy maintained that a written agreement was provided. I was not persuaded of that.

[48] Accordingly ESL is ordered to pay a penalty in the sum of \$500 for the failure to provide Mr Jefferson with a written employment agreement when bargaining for terms and conditions of employment.

## 2. Breach of good faith

[49] Section 4A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith in s 4(1) is liable to a penalty if the failure was deliberate, serious or sustained.

[50] Here the allegation of breach of good faith amounts to a wrap up of Mr Jefferson's concerns about failures to: provide him with a written employment agreement; properly bring to his attention concerns about his performance; respond to his letter dated 16 May 2007 raising a personal grievance; and attend mediation. Mr Jefferson acknowledged the incidents in themselves may not amount to a failure to act in good faith for the purposes of a penalty, but said that was their cumulative effect.

[51] To the extent that the first two of the above failures have been established, they have been addressed and I do not consider it necessary to revisit them in this context.

[52] The alleged failure to respond to the letter raising a personal grievance was answered by saying the letter was not received. Since Mr Jefferson said the letter was sent by email and post to the company and to Ms Claudy that answer is difficult to accept. On the other hand Mr Jefferson followed up by letter dated 27 June, when he also suggested mediation. Mr Loy responded on 3 July, saying he had not received the 16 May letter. Mr Jefferson re-sent it, and attempts to arrange mediation began.

[53] Regarding the alleged failure to attend mediation, Mr Jefferson approached the mediation service before filing the present problem in the Authority. Mr Loy had told Mr Jefferson he was happy to attend mediation, but the mediation service was unable to contact Mr Loy to make the necessary arrangements. The service noted that it wrote to Mr Loy in November 2007 requesting a response, but did not receive one. Mr Loy said in a statement to the Authority that he was out of the country for most of October 2007, and returned to work in the second week of November.

[54] The present problem was referred back to mediation after it was filed in the Authority, in reliance on the indications from both parties that they were willing to attend mediation. A date was arranged, but Mr Loy cancelled the meeting at short notice, saying he was ill.

[55] The Authority issued a direction to mediation dated 7 May 2008.

[56] The mediation service again noted difficulty in contacting Mr Loy, and difficulty in scheduling a mediation meeting. A meeting was eventually scheduled for 29 May 2008, but Mr Loy cancelled it at the last minute because his child was scheduled for surgery that day. The mediation service offered alternative dates, still just within the timeframe identified in the Authority's direction. This time Mr Jefferson said he had had enough of Mr Loy's cancellations, pointed out that he had been obliged to take time off work for the two cancelled meetings, and asked that the matter be returned to the Authority.

[57] For that reason, the matter was set down for an investigation meeting.

[58] Overall, there was not enough in the above to warrant a penalty for breach of s 4A.

### **Summary of orders**

[59] ESL is ordered to pay to Mr Jefferson the sum of \$3,000 as compensation for the injury to his feelings arising out of his personal grievance.

[60] ESL is ordered to pay to the Crown, through the Employment Relations Authority, the sum of \$500 as a penalty for the failure to provide Mr Jefferson with a written employment agreement in terms of s 63A(2).

**Costs**

[61] Costs are reserved.

[62] If either party seeks a determination from the Authority on the matter there shall be 28 days from the date of this determination in which to file and copy to the other party a written statement indicating the amount sought, and why. The other party shall have a further 14 days in which to file and copy to the other party a reply.

[63] If a party is unable to meet this timetable a request for an extension should be made. If no extension has been granted the defaulting party's submission will not be taken into account.

R A Monaghan

Member of the Employment Relations Authority