

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 212/10
5159692**

BETWEEN BRENDAN BRUCE MADDERN
 Applicant

AND WORLDXCHANGE
 COMMUNICATIONS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Andrew Steele and Claire Mansell, Counsel for Respondent

Investigation Meeting: 16 & 17 February 2010

Determination: 7 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Brendan Maddern claims he was unjustifiably dismissed and disadvantaged. The respondent Worldxchange Communications Limited (“Worldxchange”) denies the claims and says Mr Maddern was justifiably dismissed for poor performance. The parties were unable to resolve the differences between them by mediation.

The facts

[2] Worldxchange is a telecommunications company. It provides low cost internet and phone services.

[3] Mr Maddern commenced employment with Worldxchange in November 2005 as a Technical Response Representative. Mr Maddern was employed to provide technical support to Worldxchange’s customers by phone and email. The terms of the

employment were recorded in a written individual employment agreement dated 2 November 2005 (“the IEA”).

The dismissal for poor performance

[4] In relation to performance management the IEA provided:-

31 Performance Management

Where are you not performing your duties to our satisfaction we will:

A Formally meet with you, outline the areas of dissatisfaction, discuss what is required for satisfactory performance, and outline a review process and timeframe for reevaluation. These matters will be confirmed in writing following the meeting and a first warning may be issued.

B In the event that within the ensuing period specified above you again fail to perform your duties to our satisfaction we will formally meet with you again, outline the areas of dissatisfaction, indicate what is regarded as satisfactory performance, discuss with you ways in which that standard can be met and any resources which may be required to assist in that regard, and give you a period of time within which the performance criteria must be met. Such period will be specified by us in writing. Following the meeting a final warning may be issued.

C If at the expiry date of the period specified in the preceding paragraph we consider that any of the performance criteria have not been met, we will be entitled to immediately terminate your employment with payment in lieu of notice in accordance with Clause 27c as notice will not be worked out.

[5] Mr Maddern reported to Mr Cameron Nicholson the Technical Response Centre Manager (“Mr Nicholson”).

[6] Mr Maddern was dismissed from his employment on 4 February 2009. By letter dated 11 February 2009 the dismissal was confirmed to Mr Maddern and the reason specified:-

The reason for the termination is that despite, multiple coaching sessions/emails, informal meetings, a verbal warning given to you on 26/9/08 and written warnings on 13/11/08 & 13/1/09 your performance has not improved.

...

You have been provided with external training, support, feedback, constructive criticism and instruction to complete the tasks for which you have been employed and you have been given every opportunity to improve.

You have had an opportunity to respond to the complaint received & communication concerns at a meeting held on 4th of February 2009. I have received your explanation in writing on the 9th of February 2009; I do not consider that you have provided an acceptable reason for your continued poor performance. Due to no improvement seen after continued support and

discussion, I don't believe this matter can be resolved therefore your employment is terminated as of 11/02/2009.

[7] From May 2007 there were a disproportionate number of complaints about Mr Maddern's service. Mr Nicholson raised the complaints with Mr Maddern and discussed with him how he could improve his performance. In general the complaints were that Mr Maddern appeared bored, sarcastic, unresponsive and gave only short "yes" or "no" answers to questions. Mr Maddern had difficulty appreciating how his performance was deficient.

[8] Complaints about Mr Maddern's service continued and so Mr Nicholson arranged for Mr Maddern to attend a Key Service Skills (Kiwihost) course in February 2008.

[9] The complaints about Mr Maddern's service continued and Mr Nicholson resolved that matters needed to become formal. He wrote to Mr Maddern by letter dated 22 April 2008 inviting Mr Maddern to meet with him to discuss his concerns. At this meeting there was a full discussion about the complaints received and how Mr Maddern could improve his performance. Mr Nicholson issued Mr Maddern with a verbal warning. Mr Maddern was advised that he was expected to improve and address specific identified concerns and achieve a reduction of complaints.

[10] Mr Nicholson gave Mr Maddern audio recordings of examples of good customer service and held review meetings with Mr Maddern to assist him.

[11] There were continued complaints about Mr Maddern's service and in particular, complaints dated 21 August, 14 September and 18 September 2008. Mr Nicholson decided it was necessary to meet again with Mr Maddern. A formal disciplinary meeting was held on 26 September 2008.

[12] Mr Nicholson detailed the complaints about Mr Maddern. He advised that the complaints were about Mr Maddern's manner including short answers and long silences. Mr Nicholson reminded Mr Maddern they had discussed the same matters

previously. Mr Maddern would not acknowledge shortcomings in his performance and said that customers could not hear him properly.

[13] Mr Maddern was given a further verbal warning. Mr Maddern asked to adjourn the meeting so he could provide a written explanation dealing with the complaints about him. He provided that response to Mr Nicholson on 3 October 2008. Mr Nicholson considered Mr Maddern's response dismissive and defensive and so he decided to confirm the second verbal warning issued to Mr Maddern and recorded the same in an email of 6 October 2008. Mr Nicholson wrote:-

This email record confirms a verbal warning was given on 26/9/08 at a meeting with you in respect of customer service received on the telephone. The reasons for giving this verbal warning were;

Customer complaints/concern about support provided.

Lack of support or guidance on the telephone

2.1 short vague answers to customers questions

2.2 vague questions put forward for troubleshooting

2.3 long pauses with no reason/explanation

You are further advised that if there are any further incidence of unsatisfactory conduct, you shall receive a Formal Written Warning.

...

I expect to see a significant improvement in these areas. Your performance will be reviewed on the 3rd of November at 3.30pm ... This allows four weeks for improvement. If you require any assistance with training or if you are in any doubt as to what is required please contact me.

[14] The meeting for 3 November did not proceed because Mr Nicholson was ill. On 5 November 2008 it was rescheduled for 12 November 2008.

[15] There were further complaints about Mr Maddern dated 6, 10 and 13 November 2008 that Mr Maddern was sarcastic, rude and condescending.

[16] The complaints were put to Mr Maddern in a meeting held on 13 November. Mr Maddern did not respond to the comments because he was not provided with a transcript. Mr Nicholson decided to issue Mr Maddern with a written warning. He wrote:-

I refer to our meeting held on 13th November 2008. This email is the first written warning resulting from concerns regarding your customer service. As I informed you at our meeting, there have been continued concerns about your customer service. In particular I have received 3 recent complaints which I have provided to you. Despite the previous verbal warning given on 6th of October 2008 the

complaints about your customer service have continued. Your explanation in response to these warnings have been unsatisfactory. I expect to see significant improvement in your customer service. Your performance will be reviewed on 15th December 2008 which allows just over 4 weeks to improve. As discussed I will put together some scripts to try and assist with what I think is causing the complaints. In the meantime, if you require any assistance with training or if you are in any doubt as to what is required, please contact me.

[17] The meeting set for 15 December 2008 did not proceed and was rescheduled for 13 January 2009.

[18] Between the two meetings there were four further complaints about Mr Maddern. At the meeting of 13 January 2009, Mr Maddern could not offer an explanation. Mr Nicholson implored Mr Maddern to adopt a friendlier manner so the complaints against him might stop. He issued Mr Maddern with a further warning:-

I refer to our meeting held on 13th of January 2009. This email is the second written warning resulting from concerns regarding your customer service. As I informed you at our meeting, there have been continued concerns over your customer service. In particular I have received 4 complaints which I have provided to you. Despite the previous written warning given on 13th November 2008 the complaints about your customer service have continued. Your explanation in response to these warnings have been unsatisfactory. I expect to see significant improvement in your customer service. Your performance will be reviewed on 26th of Jan 2009. I recognise your concerns over transcripts of calls, by changing back to the soft phone I will be able to provide a transcript at the next review.

[19] There was a further complaint on 21 January 2009. A meeting was held on 4 February 2009 and Mr Maddern was provided with a transcript of the call. Mr Maddern asked to provide a written explanation. He said he gave the correct advice.

[20] Mr Nicholson resolved that Mr Maddern was not appreciating how his performance was not satisfactory and could not understand how his approach was upsetting for customers. Mr Nicholson decided that Mr Maddern could not give him confidence or reason to hope that further assistance and guidance would improve his performance. Weighing the history and Mr Maddern's attitude, Mr Nicholson decided to dismiss Mr Maddern.

[21] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[22] I now review the decision to dismiss objectively considering Worldxchange's actions and how it acted to see whether they were what a fair and reasonable employer would have done.

[23] The principles applicable in situations of dismissal for poor performance are set out in *Trotter -v- Telecom Corporation of New Zealand Limited*¹.

[24] I accept that Worldxchange gave Mr Maddern two verbal warnings and two written warnings. Although issues first arose about Mr Maddern's performance in mid 2007, it was not until April 2008 that matters became formally disciplinary.

[25] I find that Mr Maddern was given specific reasons as to why Worldxchange was dissatisfied with his work. Mr Maddern knew exactly what his employer was concerned about.

[26] I also find that Worldxchange counselled Mr Maddern in ways to improve his performance. He was given informal and formal counselling by Mr Nicholson. He was given advice and feedback. He was sent on a Kiwihost course. He was specifically advised not to pause for long periods while talking to customers, that "yes" and "no" answers were inappropriate and that detailed responses to questions were required.

¹ [1993] 2 ERNZ 659.

[27] The formal counselling process included regular reviews. The full disciplinary process proceeded over some 21 months. This meant that the time in which Mr Maddern was able to improve his performance was quite considerable.

[28] I accept that Worldxchange communicated to Mr Maddern specific, measureable and achievable actions for improvement.

[29] I also accept Mr Nicholson's evidence that Mr Maddern did not appreciate the concerns about his performance and failed to accept that while the content of his advice might have been technically correct, the real problem was the manner in which he delivered his assistance to customers. I accept Mr Nicholson's evidence that he could have no confidence or reason to hope that further assistance and guidance would improve Mr Maddern's performance. I accept the submission that overall Worldxchange offered Mr Maddern considerable opportunity over an extended period of time to improve his performance.

[30] I am satisfied that Worldxchange's decision to dismiss Mr Maddern and how it acted were what a fair and reasonable employer would have done in the same circumstances at the time.

The paper cranes problem

[31] On 4 February 2009 Mr Maddern raised a personal grievance in relation to how Worldxchange had handled his complaint arising out of paper cranes on his desk.

[32] Mr Maddern kept a pile of 300-400 paper cranes on his desk. He had constructed these cranes out of memo paper he had paid for himself. In September 2008 Worldxchange Operations Manager Mr Moore ("Mr Moore") left a note on Mr Maddern's desk "there will be no more of this until you pay for the paper. Phil Moore". Mr Maddern responded with his own note "I am paying for the paper. Brendan Maddern". Mr Maddern complained to Worldxchange that Mr Moore's note publicly humiliated him by accusing him of theft as a servant.

[33] It became apparent to the Authority that Mr Maddern had an emotional attachment to the paper crane construction he kept on his desk.

[34] Worldxchange formally investigated Mr Maddern's complaint. During that investigation Mr Maddern complained about two instances where other employees had interfered with his paper crane construction. In response to those instances, Mr Nicholson emailed staff reminding them not to interfere with other peoples' property. One employee was disciplined and Mr Maddern was informed of that fact.

[35] On 14 January 2009 Mr Maddern's complaint about Mr Moore was raised at a management meeting. Mr Moore gave Worldxchange chief executive an apology about his note to Mr Maddern. Mr Maddern was advised of this fact on 23 January 2009.

[36] Mr Maddern was not happy with Worldxchange's investigation. He was upset that he was not involved in the process, with the time it had take to reach a conclusion and that Mr Moore had not made a public apology to him.

[37] Mr Nicholson and Worldxchange's human resource manager Ms Carol Eddy ("Ms Eddy") met with Mr Maddern to discuss his dissatisfaction. Mr Nicholson and Ms Eddy apologised to Mr Maddern for the way his complaint about Mr Moore had been handled. They explained that there had been communication issues and they would endeavour to correct the issue in the future. Mr Maddern was advised that Worldxchange did not consider that Mr Moore intended to publicly accuse Mr Maddern of theft and that senior management considered the matter closed and no further action would be taken. Mr Maddern remained dissatisfied.

[38] I do not accept the allegation that Worldxchange created a hostile working environment designed to wear Mr Maddern down to force his resignation. I do not accept that the disciplinary process instigated to address issues with Mr Maddern's performance was connected with his dissatisfaction about the management of the paper crane matter.

[39] I consider that Worldxchange's actions in responding to Mr Maddern's concerns were sensitive and reasonable. I am satisfied it took his concerns seriously and took appropriate action to address matters.

The determination

[40] I determine that Worldxchange's decision to dismiss Mr Maddern and how it acted were what a fair and reasonable employer would have done in the same circumstances at the time. Worldxchange justifies its decision to dismiss Mr Maddern. I find that Mr Maddern does not have a personal grievance for unjustifiable dismissal. There will be no formal orders.

[41] I do not accept there was any unjustifiable action by Worldxchange in relation to the management of Mr Maddern's complaints about his paper cranes. I find that Mr Maddern does not have a personal grievance for unjustifiable disadvantage. There will be no formal orders.

The costs

[42] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Steele is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Maddern is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority