

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kalpesh Mehta (Applicant)
AND Bremy Limited (Respondent)
REPRESENTATIVES Dean Organ for Applicant
Garry Pollak for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 15 April 2005
DATE OF DETERMINATION 21 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Employment Relationship Problem between these parties is Mr Kalpesh Mehta's ("Mr Mehta") claim that that he was unjustifiably dismissed from his employment as Software Developer with Bremy Limited ("Bremy").

[2] The terms of Mr Mehta's employment were recorded in a written individual employment agreement dated 29 March 2004 ("the Agreement"). The Agreement contained a probationary period schedule which provided that Mr Mehta was engaged on probationary period of three months. The schedule prescribed that in consultation with Mr Mehta, Bremy would review Mr Mehta's employment on a monthly basis.

[3] In particular the probationary schedule provided:-

These reviews are intended to consider performance, conduct, compatibility and any other issues relating to employment. Where any of these issues are unsatisfactory they may result in termination of the employee. Such termination may be summary where serious, or on one weeks notice where less serious, or at the expiry of the probationary period if the matter remains unsatisfactory.

Any matters which are raised as unsatisfactory during any review shall be deemed as notice that the matters may result in dismissal if they remain unsatisfactory at the completion of the probationary period.

[4] By letter dated 24 June 2004 Mr Mehta was advised that he was dismissed:-

With regret Bremy is releasing you from your employment contract under the terms of the Probationary Period Schedule included in your contract.

Bremy unfortunately requires a person with not just the technical skill, but the skill at getting the job completed within a viable time limit for both the customer and the company. Whilst you show a level of technical skill in your completion of jobs, the time factor is not up to the standard required by our company.

Bremy is giving you one weeks notice with salary and additionally 6% of your gross income which you are entitled to. Additionally, if you wish, we can provide you a character reference for you as an employee.

[5] Mr Mehta says there were no review meetings with him at all during the probationary period. He cannot understand Bremy's criticism of his performance because he says he was given successive tasks and projects and approval at the completion of each.

[6] I find that there was a meeting held on or about 27 May 2004. Mr Lee Jacques Project Manager ("Mr Jacques") attended this meeting together with Bremy's Managing Director Mr Manuel Schamroth ("Mr Schamroth"). I accept Mr Jacques evidence that this meeting was an informal chat to see how Mr Mehta was getting on. It was not formal in any way. I find too that there were no concerns or problems about Mr Mehta's performance which were drawn to his attention in a sufficiently formal way for remedy by him. As well, I find that there was nothing in this meeting that was sufficient to place Mr Mehta on notice that if he did not improve his performance his employment would not be continued.

[7] I find that there was a further meeting on or about 8 June 2004 which was more formal. I accept Mr Jacques evidence that three matters were raised with Mr Mehta debugging, reporting and coding. Mr Jacques also told Mr Mehta he was taking too long. Mr Mehta was asked to add comments to his debugging code, notify management of any problems he encountered and to seek assistance re coding. That I find was the substance of the second meeting.

[8] Section 67 of the Employment Relations Act 2000 ("the Act") deals with probationary periods. The law relating to unjustifiable dismissal is not changed by such arrangements. I consider that the legal principles relevant in determining the present problem are succinctly set out in a decision of the Court of Appeal in *Nelson Air Ltd v NZALPA*¹ where the Court stated:-

Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.

[9] Since that case was decided, the statutory duty of good faith makes it all the more imperative that the employer takes an active approach to ensure the trial period will ultimately be successful.

[10] The final meeting was in my view sufficient to constitute a review meeting. Mr Mehta was advised of matters that required his attention. He was advised of how to remedy his performance. However, it was the only performance meeting with him during the three month probationary period. It was not in my view sufficient to justify the eventual termination of Mr Mehta's employment. On its own, it was not enough for the employer to discharge its obligations to Mr

¹ [1994] 2 ERNZ 665 (CA)

Mehta. Mr Mehta was entitled to an opportunity to correct his performance. Nor for that matter am I persuaded that when he was dismissed on 24 June 2004, his performance had continued to remain unsatisfactory. He was not given any further review meeting to follow up what was discussed in the meeting held on or about 8 June 2004. He was simply dismissed without more.

[11] Mr Schamroth says that he held a meeting with Mr Mehta on 24 June 2004 prior to the dismissal. I find that he did not hold any such review meeting. I also reject Mr Schamroth's evidence that as a result of the meeting held on or about 8 June 2004 he directed Mr Mehta to sit a Microsoft test. He made no such direction and the test actually undertaken by Mr Mehta, whatever it was, was not pursuant to any formal review process.

[12] When Mr Mehta was dismissed on 24 June 2004 that was a mere 16 days after the only review meeting held with him on or about 8 June 2004. That was not a reasonable opportunity for his performance if it was defective to be improved upon because the period he was actually contractually entitled to for that purpose was three months.

[13] Mr Mehta was contractually entitled to more than one review meeting. I am satisfied that he was not afforded an adequate opportunity to correct any defects in his performance, if there were any, and nor am I persuaded that Bremy is able to show that his performance was in fact defective when he was eventually dismissed in the respects he had been notified in the one review meeting held with him.

[14] The reason given in the letter of dismissal dated 24 June 2004, was not a principle concern formally raised with him in the meeting on or about 8 June 2004 by way of notice to him that it required his attention and if it was not acted upon, would result in his dismissal. The other three specific matters were communicated to him in that way. The justification for the termination ultimately advised was not. I am not persuaded that following the meeting on or about 8 June 2004 that there was anything that remained unsatisfactory which had previously been notified to Mr Mehta.

[15] For the above reasons, I am not satisfied that Mr Mehta was given fair warning before the end of the probationary period that his employment would then be coming to an end. Bremy failed to accord him the requisite fairness such that the decision to dismiss him is unjustifiable. **I find that Mr Mehta has a personal grievance for unjustifiable dismissal and he is entitled to remedies in settlement of that personal grievance.**

[16] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am unable to find any blameworthy conduct on Mr Mehta's part that would constitute contributory fault. There is therefore, no basis for reducing the nature and extent of remedies to him.

Reimbursement

[17] Mr Mehta seeks reimbursement of lost wages. He now works as a cashier at a Mobil service station in Swanson. He secured temporary work from 5 September 2004 with *Lotons* stocktaking. He says he registered with various recruitment agencies but was not successful in obtaining any permanent assignments because he was unable to provide a letter attesting to his local experience. I do not agree that employees subject to probationary periods can have no claim to lost wages in the same way that genuinely redundant employees do not. It cannot be taken for granted that the

employment may not have continued. It ought to be more likely that it would given the object of the exercise is to endeavour to bring about an eventual permanent employment.

[18] I am satisfied that Mr Mehta took steps to mitigate his losses. I award him two months lost wages in the gross sum of \$6,666.67. **Bremy Limited is ordered to pay to Kalpesh Mehta the gross sum of \$6,666.67 as reimbursement of lost wages.**

Compensation

[19] Mr Mehta says that he suffered mentally and emotionally because of the loss of his employment. He said he felt very badly treated. That was the extent of his evidence. The paucity of the evidence aside, I do accept that he has suffered loss of dignity, hurt and humiliation and injury to his feelings. Having regard to his evidence, the nature of the personal grievance and the limited period of employment, I make a modest award. **Bremy Limited is ordered to pay to Kalpesh Mehta the gross sum of \$500.00 as compensation.**

Costs

[20] In the event that Mr Mehta seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Organ is to file and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Pollak is to file a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority