

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 82/08
5031090

BETWEEN RICHARD POTTER
Applicant

AND AUSTRALIAN CONSOLIDATED
PRESS NZ LTD
First Respondent

Member of Authority: Vicki Campbell

Representatives: Mark Ryan for Applicant
Doug Alderslade for Respondent

Investigation Meeting 9 August 2007 at Auckland

Further information received 11 December 2007
25 January 2008

Submissions Received: 25 January 2008 from Applicant
from Respondent

Determination: 11 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Richard Potter was employed by Australian Consolidated Press NZ Ltd as a Commercial Advertising Executive in the Pacific Marine Media department. His employment was subject to an individual employment agreement which provided for a base salary plus commission.

[2] Mr Potter claims he was disadvantaged in his employment by unjustified actions of the Respondent and that he was constructively dismissed. Further, Mr Potter seeks payment in the amount of \$21,962.38 for outstanding commissions he says remain unpaid.

Disadvantage claim

[3] Mr Potter claims he has a personal grievance for unjustifiable disadvantage in relation to the transfer of ownership of a number of clients from Mr Potter to another sales person. Mr Potter says Ms Roxanne Salton, Corporate

Sales Manager removed the clients from his sales spreadsheet and therefore no commission would be payable for those clients and any record of Mr Potter having made a sale to those clients.

[4] Mr Potter also claims unjustified disadvantage in relation to a disciplinary process embarked on by Ms Salton to address issues of performance. Mr Potter says Ms Salton misled him when she told him the company had received a complaint from a client. Mr Potter had received an email from the client which confirmed to Mr Potter the client had no complaint and would like to retain Mr Potter as their account manager.

[5] Further, Mr Potter discovered another client, also removed from Mr Potter's sales portfolio, and whom Ms Salton had advised him had made a complaint, had never had difficulties in dealing with Mr Potter. Mr Potter says the actions of Ms Salton advising of the client complaints when at least two clients had not complained was an unjustified action which disadvantaged him in his employment.

[6] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether the employers actions disadvantaged the applicant in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act (see *Mason v Health Waikato* [1998] 1 ERNZ 84).

[7] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If the employer establishes justification for its disadvantageous actions, there is no grievance (see *McCosh v National Bank*, unreported, AC49/04, 13 September 2004).

[8] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employees subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000)

[9] With regard to the transfer of the clients from Mr Potter to another sales person, the evidence shows that adjustments to client lists was undertaken by ACP, but only after discussion with Mr Potter.

[10] Mr Potter says he did not agree to the removal of the clients. Removal of clients from a commission paid employee is an action which can lead to disadvantage. In this case, the removal of the clients into the telesales area, to allow Mr Potter the opportunity to expand the business in other areas did not lead to his disadvantage. Mr Potter continued to receive commission payments in respect of those clients for the three months from April to June inclusive.

[11] Mr Lee Williams, Group General Manager, confirmed at the investigation meeting that it was his decision as to reallocation of customers or commission plans. It was put to Mr Williams that Mr Potter perceived his clients had been taken away to reduce his commission. Mr Williams said that was not the reality. He had 300 clients and could not service all of those. He wanted to get Mr Potter's skills in front of the manufacturers, his biggest clients, and have the telesales look after the smaller ones. He said everyone's commission structure changed.

[12] Mr Potter confirmed he understood that the company was trying to maximise the company's revenue. He also agreed that all sales representatives would be asked to drop off or take on customers to maximise the returns. He also accepted that ACP was trying to take off the dross and focus on the larger clients. Mr Potter also accepted that ACP, and not Ms Salton, was driving that change. Mr Potter also accepted that with the commission structure, the reality was that his income kept going up.

[13] Mr Potter has not satisfied me that he has been disadvantaged in his employment as a result of the reallocation of clients.

[14] It was common ground that Ms Salton embarked on a disciplinary process with Mr Potter. In February 2004 Ms Salton first raised some general issues with regard to some aspects of Mr Potter's behaviour including completion of leave forms, and reporting in when sick, late, or out of Auckland, and reminding him of his hours of work. Ms Salton hoped that in raising her concerns in the manner she did, that Mr Potter would take them on board and address them appropriately.

[15] I am satisfied that the employment relationship between Mr Potter and his manager was not plain sailing for either of them. I find Ms Salton had genuine concerns regarding some of the behaviours exhibited by Mr Potter. In February Ms Salton, with prior written notice to Mr Potter, met and discussed with

him, issues relating to administrative processes which he was required to adhere to, together with issues of negatively discussing ACP.

[16] Further informal discussions were held with Mr Potter in May and early June 2004. These discussions also centered on administrative tasks not being completed by Mr Potter. When confirming her discussions with Mr Potter, Ms Salton continued to reinforce his capabilities as a sales person and made offers to assist Mr Potter meet the company's expectations.

[17] When her informal approaches did not bring about the changes she was seeking Ms Salton implemented a formal disciplinary process. A formal disciplinary meeting was held on 29 June 2004. The issues discussed included similar issues as had been discussed informally previously, but also included some customer complaints received about Mr Potter. Mr Potter says, but I do not accept, that the customer complaints were only raised to justify the removal of some of Mr Potters clients.

[18] Mr Potter says it was the conduct of Ms Salton when she provided misleading information with regard to the customer complaints that led to his disadvantage. I do not accept Ms Salton was deceptive or misleading when she raised the customer complaints with Mr Potter. The context in which Ms Salton raised the customer complaints was with regard to Mr Potter's reaction to her dealing with the customer complaints that she raised as an issue. Out of the four complaints apparently received from customers Mr Potter has only cast doubt on one. I am satisfied ACP had received a complaint from SOPAC. This is supported by the documentation produced Mr Potter, where Mr Rhodes explains that he is not happy that while he was away another staff member had complained about the service she had received from Mr Potter. Mr Rhodes takes pains to assure Ms Salton that he did not have any complaints about Mr Potter's service. That might be so. But it is clear that one of his staff members did.

[19] As a result of the disciplinary interview with Mr Potter, no disciplinary action was taken. It follows that Mr Potter has not been disadvantaged in his employment. This aspect of his claim therefore fails.

Constructive dismissal

[20] As already set out above, during June 2004 Ms Salton commenced a disciplinary process in relation to Mr Potter's performance. The outcome of that process was that no action would be taken by ACP. This was advised to Mr Potter

on 1 July 2004 by Mr Lee Williams ACP's Group General Manager. On 6 July 2004 Mr Potter resigned.

[21] The nature of Mr Potter's claim under this heading is that his resignation ought to be regarded as a constructive dismissal and that his dismissal was unjustifiable. In deciding whether the circumstances of this case gave rise to a constructive dismissal I am guided by the principles enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

[22] Further, following the approach of the Court in its recent decision *Gorrie Fuel (SI) Ltd v Gittoes*, unreported, 8 November 2007, Couch J, CC21/07, if I find that this was a constructive dismissal, I must then determine whether it was justifiable in accordance with s.103A of the Employment Relations Act 2000.

[23] Applying those principals to this aspect of Mr Potter's claims, the issues are:

- Was there a breach of duty by ACP to Mr Potter?
- If so, was that breach sufficiently serious to make it reasonably foreseeable that Mr Potter would resign as a result?
- If so, did Mr Potter actually resign as a result of that breach?
- If Mr Potter was constructively dismissed, were the actions of ACP those which a fair and reasonable employer would have taken in the circumstances?

[24] On 24 June 2004, before the disciplinary meeting was held with Mr Potter, Mr Potter spoke to a Mr Wayne Fletcher, and told him he thought he was on his way out and requested a short-cut pay out resolution. On hearing of this Mr Williams told Mr Potter that while they were going through a formal process, the power to fix the issues lay with him [Mr Potter]. Mr Williams advised Mr Potter that if he does fix the issues then his career at ACP would move forward.

[25] As already stated, on 6 July 2004 Mr Potter resigned from his employment via email. In his email Mr Potter refers to his relationship with Ms Salton as having "...broken...". Mr Potter felt he had been "...forced out of [his] position at Trader Group". Mr Potter claims the respondent breached its duty of implied trust and confidence when Ms Salton was deceptive and withheld information with regard to two customer complaints raised by her during the disciplinary process.

[26] On receipt of his resignation Mr Williams responded to Mr Potter, disagreeing with him that he was being forced out or that his position was untenable. Mr Williams accepted the relationship had broken down with Ms Salton, but disputed Mr Potter's assertion that it was as a result of Ms Salton's management.

[27] Mr Williams told Mr Potter:

Our go forward meeting was to present these issues and have a common sense discussion, re-establishing the required standards and procedures and putting a frame work and to give my personal commitment to be involved over the next three months (not 6 weeks) to ensure our common goals of revenues, developing products and following correct process within good working relationships were achieved.

I would still like to have this meeting rescheduled from Tuesday 6th July 4pm to Thursday 8th July 4pm. Given the enjoyment of your role at Trader Group I would ask that you attend this, be involved in the discussion and then make your resignation or go forward decision.

[28] Mr Potter was thankful for Mr Williams response, but decided to continue on with his resignation and leave ACP.

[29] I am satisfied ACP did not follow a course of conduct with the intention of coercing Mr Potter to resign. Employers are entitled to address performance issues with staff, provided they act in a fair and reasonable manner. I am satisfied that in this case ACP acted at all times as a fair and reasonable employer would.

[30] Equally there is no evidence to support a claim that ACP breached its duty to Mr Potter to such a degree that he had no option but to resign. It seems to me that Mr Potter was reluctant to follow the processes and procedures expected of him and when these matters were raised with him, he reacted negatively. If fault is to be attributed then it will not be attributed to Ms Salton. Mr Potter must take responsibility for the way he reacted to each of the discussions Ms Salton had with him and for his failure to show any demonstrable improvements in his behaviour.

[31] Mr Potter was not constructively dismissed and I can be of no further assistance to him with regard to this aspect of his claims.

Outstanding commissions

[32] Mr Potter claims \$21,962.38 remains outstanding for commission payments for sales made during his employment. The applicant bears the onus of proof with regard to this claim.

[33] Various documents and spreadsheets have been provided to the Authority, a number of which were confusing and unclear. ACP says Mr Potter's calculations for commission payments include advertisements which were placed by Australian agents and not by Mr Potter himself. ACP says there is no obligation to pay these commissions.

[34] Mr Potter claims his employment agreement provides for commissions to be calculated on all sales including all Australian, direct and agency, advertising. The initial employment agreement between the parties and dated 19 June 2000 provided for commission to be calculated and paid as follows:

Trade-A-Boat New Zealand 20% to be paid on all commercial advertising above the \$6,000 per issue threshold;
Boatpoint.co.nz 20% to be paid on all commercial advertising;
Yachting World Pacific Edition 15% to be paid on all commercial advertising;
Bluewater Fishing 15% to be paid on all commercial advertising;
Trade-A-Boat Australia 15% to be paid on all commercial advertising.

[35] Commissions were to be paid on the publication of the magazine to which the commission applied and any bad debt write-offs to be subtracted from the monthly total and could be reviewed quarterly.

[36] The Authority has been provided with various updates to the commission clause which I am satisfied have been discussed and agreed to by Mr Potter. The most important document is one dated 11 November 2001 and which states, in relation to the commission payments on bookings in Trade A Boat New Zealand:

Display advertising is clearly defined as advertising on the correct display rate card sold and booked directly by yourself. This does not include Australian bookings or advertisers on brokerage rates.

[37] There is no evidence from Mr Potter to suggest that he disputed this notification as being incorrect. Neither is there any evidence of any shortfalls of commission prior to Mr Potter leaving his employment.

[38] I accept Mr Williams evidence that Mr Potter, in making his claim some months after he has left ACP, has included amounts relating to advertising booked through others including Australian bookings. Mr Potter is not entitled to commissions for bookings made in Trade A Boat magazine where those bookings came from the Australian Trader team.

[39] I find that Mr Potter has wrongly claimed revenue commissions in respect of bookings made by the Australian Trader team. This conclusion leads to a finding that ACP have significantly overpaid Mr Potter, between \$15,000 and \$24,000. However, in his evidence, Mr Williams had made it clear that Mr Potter will not be required to pay the overpayment back.

[40] I find that Mr Potter has not met the onus of proving he is owed outstanding commissions and therefore this aspect of his claim fails.

Costs

[41] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority