

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Noushad Roushan
AND Sony New Zealand Limited
REPRESENTATIVES Tony Kurta, advocate for Noushad Roushan
Gillian Service, counsel for Sony New Zealand Limited
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 18 January 2007
SUBMISSIONS RECEIVED 7, 9, and 16 February 2007
DATE OF DETERMINATION 12 June 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sony New Zealand Limited ("Sony") employed Noushad Roushan as a technician in the company's service centre, commencing in 1998.

[2] Mr Roushan's home was burgled in December 2005. Subsequently he made a claim on his insurance in terms which caused an insurance investigator to approach Sony for further information about certain items apparently purchased from Sony. When Sony obtained the relevant invoices, and compared them with those Mr Roushan had submitted to the insurer, it became concerned that the submitted invoices had been falsified. After an investigation it dismissed Mr Roushan for presenting falsified invoices to the insurance company.

[3] Mr Roushan says the dismissal was unjustified. Reinstatement was sought, but that application was withdrawn at the investigation meeting.

The invoices

[4] By facsimile message dated 19 January 2006 the insurance investigator sought from Sony proof of purchase in the form of invoices for the items it identified, including:

- (a) an amplifier, having the model details, invoice number and price identified;
- (b) a VCR, with the same details provided; and
- (c) a plasma television, having the invoice number and price identified.

[5] The invoices Mr Roushan had submitted in respect of these items showed:

- (a) the amplifier was purchased by way of cash sale at the company's service centre, for the total sum of \$1,800 and with delivery details in the name of Noushad Roushan;
- (b) the VCR was purchased by way of cash sale at the service centre, with 'cash sale' also being recorded in 'delivery details' field; and
- (c) the plasma television was also a purchase by way of cash sale at the service centre, and with delivery details in the name of Noushad Roushan.

[6] The true copies of the original invoices corresponding with the invoice numbers and product details on the submitted invoices showed:

- (a) the name 'Preena' was listed in the delivery details for the amplifier;
- (b) the VCR was still recorded as a cash sale in the delivery details; and
- (c) the name 'Grays Auction' was listed in the delivery details for the plasma television.

[7] The 'delivery details' field identifies the purchaser of the items, and there were obvious differences between the invoices for two of the items. Another difference affecting all three invoices was in the slightly differing layout and format, and thirdly the submitted invoices did not include the notation 'tax invoice reprint' which is automatically printed on a properly obtained replacement invoice.

[8] For these reasons Sony concluded the submitted invoices were not genuine Sony original or reprinted invoices.

[9] It also sought to ascertain whether Mr Roushan had really purchased the products himself, finding Mr Roushan had purchased an amplifier with the same

model number as the one on the submitted invoice but at a much lower purchase price. Overall though, because of certain limitations in the way purchases at the service centre were recorded, it was unable to say whether Mr Roushan had or had not purchased the items in the submitted invoices. It decided the issue of concern was the appearance that falsified Sony invoices had been submitted to the insurance company. It decided to seek an explanation from Mr Roushan.

[10] Accordingly on 24 January Mr Roushan was asked to attend a meeting as part of an investigation into the invoices he had provided to the insurance company.

The investigation

[11] Stephanie Field, the human resources manager, and Clark Hamilton, the division manager with responsibility for Mr Roushan's area of work, met with Mr Roushan on 27 January 2006.

[12] Ms Field began the meeting by explaining how Sony had come to be investigating the matter, and saying 'based on [the] investigation to date, it appeared that the invoices had been falsified.'

[13] According to Ms Field's contemporaneous meeting note, Mr Roushan:

'admitted he had provided these to the insurance company and that he had done so because he didn't keep his receipts when he purchased the products. He stated that he asked another staff member, Javed Khan, if he could get invoices for him for the specific product...'

[14] The note goes on to record what amounted to an explanation from Mr Roushan to the effect that he was the owner of the products. The note shows Ms Field recognised that, saying ownership was not in question but the validity of the invoices was. She told Mr Roushan that two of the invoices had been falsified by changing the name of the 'delivery details' field and in one (for the amplifier) the value of the goods purchased was more than Mr Roushan would have paid for the product.

[15] Further in relation to the invoices and the matter of ownership, Mr Roushan told Ms Field and Mr Hamilton he had purchased the plasma television for a friend but in the event had retained it himself.

[16] My first concern about the investigation is that, although Mr Roushan told me he understood the invoices being referred to were the ones he had 'asked Javed for', the meeting note does not record whether Mr Roushan was shown any invoices. When I asked the company representatives about the matter there was uncertainty, and a suggestion but no clear recollection that the submitted invoices were shown to Mr Roushan later in the meeting.

[17] Regarding Ms Field's reference to the value of the amplifier in question, no further information on the point was put to Mr Roushan for his response. The concern about the amplifier was also raised frequently in the investigation meeting. If Sony suspected that for the purposes of his insurance claim Mr Roushan had substituted in the invoice, or caused to be substituted, a higher price than had actually been paid for the item, it should have put that to him in more detail than it did.

[18] Mr Roushan's further response to Ms Field on 27 January was to apologise and say he should not have provided the false invoices to the insurance company. According to the meeting note, Mr Hamilton then asked Mr Roushan if he realised providing an insurance company with falsified information amounted to fraud. Indeed it was clearly Mr Hamilton's view during the investigation meeting that Mr Roushan was guilty of fraudulent conduct. Mr Roushan reiterated at the 27 January meeting that he did actually own the product for which he had claimed, and Mr Hamilton repeated that ownership was not the issue.

[19] After further discussion about contacting the insurer, Mr Roushan is recorded as apologising again, and saying 'I understand I was wrong – I thought Javed would be aware if this was wrong.'

[20] The meeting ended with Mr Roushan being advised a disciplinary meeting would follow, he was entitled to bring a representative to the meeting, and there was a possibility of dismissal.

The disciplinary meeting

[21] Prior to the disciplinary meeting Ms Field and Mr Hamilton confirmed Mr Roushan had attended a training course on the company's code of conduct. They also concluded that clause 1.1 and 3.11 were relevant. Clause 1.1 contains a statement that all Sony personnel are expected and directed to comply with the

laws and regulations of the countries in which the company operates, as well as internal rules and policies. Clause 3.11 provides:

"All records, recordation and reporting of information ... must be accurate, complete, honest and timely and must be a fair representation of the facts. Personnel should never cause records to be inaccurate or create records that are misleading or artificial. ..."

[22] Ms Field and Mr Hamilton also sought to verify Mr Roushan's references to Mr Khan's involvement.

[23] However Mr Khan was absent on leave at the time, and he was not spoken to at all during the investigation into Mr Roushan's conduct. Instead, prior to the disciplinary meeting, Ms Field searched both men's company email accounts. She found a prompting message from Mr Roushan to Mr Khan, and an email message dated 6 December 2005 from Mr Khan to Mr Roushan which attached the invoices and advised Mr Roushan to print them rather than sending them electronically. Another invoice was forwarded by message dated 8 December.

[24] Ms Field and Mr Hamilton drew inferences from these exchanges which were adverse to Mr Roushan. They were also concerned about why Mr Khan was the person approached for the replacement invoices, when a number of other staff members at the premises where Mr Roushan worked could easily have provided him with the necessary replacements. Mr Khan worked at separate company premises. Ms Field and Mr Hamilton noted too that, because of his position, Mr Khan was able to access and amend certain electronic records while staff members at Mr Roushan's premises were not able to do so.

[25] The disciplinary meeting went ahead on 3 February. Mr Roushan chose not to bring a representative.

[26] Ms Field 'restated the situation' summarising again the approach from the insurer, saying an investigation had been carried out, it became clear that the submitted invoices were not genuine Sony invoices, and that Mr Roushan had admitted on 27 January that the insurance company had been provided with falsified invoices. She went on to say that these actions were in breach of the company code of conduct and illegal, that is they were fraudulent.

[27] When Ms Field offered him the opportunity to make further comment Mr Roushan merely stated that he had purchased the products genuinely, but no

longer had the original invoices. He was told again that ownership was not in question, rather the falsified documents were the issue. He said he understood. When asked if he had changed the names on two of the invoices or whether he had received the documents with the name already changed, he said Mr Khan had sent the documents to him with his name on them. He had nothing to add.

[28] Ms Field and Mr Hamilton adjourned the meeting to consider what to do. They decided there was no need to hear from Mr Khan on the matter, since they already had the necessary admissions from Mr Roushan. They concluded that although Mr Roushan had not physically changed the documents himself, he had knowingly submitted them to an insurance company, which was a very serious matter.

[29] After resuming the meeting, Ms Field and Mr Hamilton offered Mr Roushan an opportunity to resign. He declined. He was given a letter of dismissal which stated the reason for the dismissal as:

“... you provid[ed] falsified Sony New Zealand invoices to your insurance company. As discussed with you, this act is not only illegal, it also constitutes a breach of the global Sony code of conduct. ”

[30] The company believed instant dismissal for serious misconduct was appropriate, but it also paid Mr Roushan 4 weeks' pay in lieu of notice in order to assist his financial position.

Justification for the dismissal

[31] I apply the test of justification for a dismissal set out in s 103A of the Employment Relations Act 2000 as follows:

“... the question of whether a dismissal ... 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 ... occurred.”

[32] I do not believe Sony's investigation was sufficient to support the conclusion it reached about Mr Roushan's conduct, and set out in the letter of dismissal. Similarly, I do not believe that some of its actions in respect of the investigation into Mr Roushan's conduct amounted to 'what a fair and reasonable employer would have done'. I now set out the reasons for this conclusion.

[33] The investigation began on the correct path when the company identified the possibility that the submitted invoices were not genuine Sony original or reprinted invoices. The possibility that both Mr Roushan and Mr Khan had breached at least clause 3.11 of the employment agreement also warranted further investigation. For those reasons I also have no difficulty in accepting there was enough in Mr Roushan's responses during the 27 January meeting to warrant moving to conduct a disciplinary meeting.

[34] However the investigation veered off the correct path because of the very early stage at which it was put to Mr Roushan that the invoices were 'falsified' and the underlying view – expressed by Mr Hamilton in particular – that Mr Roushan was guilty of fraudulent and illegal conduct.

[35] It would have been better to begin by putting to Mr Roushan that the submitted invoices were neither originals nor authorised replacements, and seeking an explanation. Instead, before there had been a proper discussion of the invoices and their contents and without any further information about how and why they had been obtained, the company moved immediately to the more serious proposition that the documents had been falsified. In addition, it had its suspicions about why Mr Khan was the person Mr Roushan approached, and had drawn adverse inferences drawn from the email exchanges between the two men. Neither of those matters was put to Mr Roushan.

[36] Sony's approach to its investigation was to place heavy reliance on what it considered to be Mr Roushan's prompt, and repeated, admissions that he had falsified the invoices. Indeed it believed, in effect, that the admissions were determinative. However the company's briefs of evidence read together with its notes of the relevant meetings, as well as the discussion during the investigation meeting, raised a question about how far any apparent admissions could be taken.

[37] Mr Roushan's earliest admission, on 27 January, was merely that he had submitted the invoices. At that point it is unclear whether he had even been shown the invoices, and Sony had not drawn to his attention the detail of its concerns about them. To the extent that Mr Roushan was admitting to any false element in them, his recorded response indicates only an admission that he had not provided the originals to the insurer but had instead obtained replacements from Mr Khan.

[38] Although Ms Field went on to identify the false elements, namely the changed delivery details and the concern about the value of the goods purchased, she did not ask Mr Roushan to explain the changed delivery details and did not put to Mr Roushan any detail of the concern about the value of the goods purchased. Those matters should have been explored with Mr Roushan and Mr Khan before any conclusion was reached.

[39] While it is true that Mr Roushan's response was to apologise again and say he should not have provided the false invoices to the insurer, he said in evidence that he did so because Ms Field had told him that the invoices were false. Similarly, when asked what was false about them, Mr Roushan said Ms Field had told him the 'names were wrong'. His attitude was that, if the company told him he had done something wrong, then he had done something wrong.

[40] I acknowledge that Mr Roushan did not otherwise seek actively to explain himself or disagree with what was being put to him at the time, and showed even more of that tendency during the Authority's investigation meeting. Indeed he was reluctant to answer questions in the Authority, and eventually became abusive. Such an approach did not assist him during the Authority's investigation, and to the extent that he displayed similar behaviour during Sony's investigation a similar comment would apply. At the same time, however, I would not accept Mr Roushan's approach was sufficient to overcome the shortcomings I have identified in Sony's investigation.

[41] Mr Roushan apologised for his conduct a second time on 27 January, saying again 'I understand I was wrong' and he believed Javed 'would be aware if this was wrong'. That was an admission, but it is not clear to what Mr Roushan was admitting. Although the company did not understand it this way I find it was capable of amounting to no more than an admission that, rather than submitting original invoices to the insurer, Mr Roushan had obtained replacements from Mr Khan.

[42] I also consider it was critical to obtain Mr Khan's account of what he did and why in order to place Mr Roushan's conduct in its appropriate context. Sony's reliance on what it thought was Mr Roushan's admission to having 'knowingly submitted false Sony documents to his insurance company' meant it did not obtain that account prior to making the decision to dismiss. It did not

obtain such an account until after the dismissal, and then only in the context of a disciplinary investigation into Mr Khan's part in the matter.

[43] Mr Khan's account was discussed in meetings with him on 14 and 20 February 2006. According to the notes of those meetings, Mr Khan admitted providing the invoices to Mr Roushan. He said Mr Roushan asked for the invoices, but said he did not have serial numbers for the items in question and that one of the items had been purchased for a friend. Eventually Mr Khan found some invoices, but they did not have Mr Roushan's name on them. According to Mr Khan, Mr Roushan said that would be ok. He said, too, that Mr Roushan asked him to change the delivery names to his name. Mr Khan said he did so to help a friend out. That information should have been obtained and put to Mr Roushan before Mr Roushan's dismissal, in order to properly assess both its veracity and Mr Roushan's culpability.

[44] Mr Khan was issued with a final written warning. Because of my conclusion regarding the justification for the dismissal, it is not necessary to address any issues arising from apparent disparity in the disciplinary action taken respectively against Mr Roushan and Mr Khan.

[45] For the reasons indicated above I conclude the dismissal was unjustified. Mr Roushan has a personal grievance on that ground.

Remedies

[46] Mr Roushan is entitled to the reimbursement of remuneration lost as a result of his personal grievance, with a reduction to the extent he is guilty of contributory fault. His salary at the date of dismissal was fixed at \$49,280, with a variable component of \$2,433. He also received a healthcare allowance of \$614.

[47] Mr Roushan is now in business for himself as a TV aerial installer. He began in March 2006 by working for a friend for 6 weeks without pay, in order to learn the work, before continuing on his own account.

[48] The final payment he received from Sony meant Mr Roushan effectively began losing remuneration from 3 March 2006. His losses thereafter occurred partly because he had lost his job at Sony, and partly because he chose to take

up the work he did rather than seeking alternative paid employment. In those circumstances, and with reference to s 128 of the Employment Relations Act, I do not consider it appropriate to consider reimbursing Mr Roushan for any more than 3 months' lost remuneration.

[49] Moreover, Mr Roushan was guilty of blameworthy contributory fault. I consider it likely that he knew he was not presenting his insurer with his own original invoices or with the company's standard replacement invoices. He recognised that the invoices Mr Khan provided were not the company's replacement invoices and that the 'names were wrong'. He submitted the invoices anyway.

[50] I regard this as significant contributory fault and reduce the amount I would have awarded Mr Roushan accordingly. Sony is therefore ordered to reimburse Mr Roushan for a further 4 weeks' wages.

[51] The 'variable component' of Mr Roushan's remuneration was a percentage of base salary, payable if agreed and signed objectives were met. I am unaware of whether those criteria were met or whether Mr Roushan had accrued any associated entitlement. The parties should address that matter themselves, and leave is reserved to refer it to the Authority for determination if necessary.

[52] Bearing in mind the reduction for contributory fault, Sony is further ordered to reimburse Mr Roushan $1/13 \times \$614 = \47.23 in respect of his healthcare allowance.

[53] Regarding compensation for the injury to Mr Roushan's feelings, Mr Roushan visited his doctor about a week after his dismissal complaining of stress and an inability to sleep. He also mentioned having suicidal feelings, but, fortunately, those feelings passed relatively quickly. Again taking into account the presence of contributory fault, I order Sony to compensate Mr Roushan for injury to his feelings in the sum of \$3,000.

Summary of orders

[54] Sony is ordered to pay to Mr Roushan:

- (a) 4 weeks' wages as reimbursement of lost salary;

- (b) \$47.23 in respect of the healthcare allowance; and
- (c) \$3,000 as compensation for injury to his feelings.

[55] Leave to refer to the Authority the matter of the 'variable component' of Mr Roushan's remuneration is reserved.

Costs

[56] Costs are reserved. If the parties seek a determination from the Authority on the matter they are to file and serve memoranda within 28 days from the date of this determination.

R A Monaghan
Member of Employment Relations Authority