

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN Phillip Sassoon Saleh (Applicant)
AND The Internet Group Limited (Respondent)
REPRESENTATIVES Greg Peploe, Advocate for Applicant
Dean Organ, Advocate for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 6 April 2001
INVESTIGATION 7 May 2001
COMPLETED
DATE OF DETERMINATION 17 May 2001

DETERMINATION OF THE AUTHORITY

The employment relationship problem

1. The applicant commenced employment with the respondent (“Ihug”) on 11 or 12 September 2000 and occupied the position of creative director, reporting to the operations manager, Ms Lee. He was dismissed on 12 January 2001 for serious misconduct. He considers this dismissal to be unjustified, and lodged an employment problem with the Authority on 14 February 2001.
2. He sought interim reinstatement and in support of this attached an affidavit to his statement. The Authority advised that it was in a position to investigate the substantive problem promptly and so would be able to deal with the whole thing at once. This was agreed by the parties to be the best course and a timetable for the investigation was set. Unfortunately, immediately prior to the scheduled investigation meeting Mr Saleh sought an adjournment on the grounds of ill-health. The timetable for the investigation was revised by consent. As intended, I finally dispose of all matters in this determination.
3. The Authority took evidence from:
 - Mr Saleh
 - Ms Lee (formerly the respondent’s operations manager)
 - Ms Pienaar (respondent’s human resources manager)
 - Mr Robertson (formerly the respondent’s business manager)

4. Both Mr Robertson and Ms Lee were themselves made redundant shortly after the applicant was dismissed.

The facts

5. In his affidavit, Mr Saleh explained the action for which he was ultimately dismissed as follows:

“On December 14 I sent a copy of an e-mail to my supervisor, Kat Lee,...that I had made out that I had sent to an associate...The e-mail was in fact sent to a fictitious address.”

6. Attached to the affidavit was a copy of the e-mail that read as follows:

“Hi Roger
Kat went behind my back on the EMI digital conversions and stole the job and gave it to her boy. Who ever that is?
It was nothing to do with her, she can not be trusted.
Sorry rog she’s a backstabbing cunt.
I will have nothing more to do with her.
Talk to you later Phil.”

7. The e-mail was expressed to have been sent to the e-mail address of ‘Roger’ and copied to her. It is now common ground that although the third party, ‘Roger’ was a business associate of Mr Saleh the address itself was fictitious and the e-mail did not reach him. Mr Saleh explained:

“I thought about sending the e-mail to [Roger] to let him know how I felt about the incident, but I thought better of it. Instead I sent a copy of the e-mail to Kat that I had made out I had sent to [Roger.]”

8. Upon receiving the e-mail, Ms Lee responded by e-mail, copied to “Roger” at the fictitious e-mail address Mr Saleh had used, and apologised to them both for

“going behind yr back and telling my guy about this job.”

9. Because it was made much of by the applicant, I note that this e-mail contained a considerable amount of bad language, although not directed at anyone, in fact it was conciliatory in tone. After sending it Ms Lee phoned Roger, at which point she learnt from him that he had not received it. I accept that her actions at the time she received the email clearly indicate that on receiving it she believed at the time that it had also gone to “Roger.”

10. Ms Lee and Mr Saleh have given consistent accounts of what led up to the sending of the e-mail. It was that Mr Saleh had, with Ms Lee’s approval, offered “Roger” some contract work with Ihug. This involved converting tapes to digital format so that they could be used for an Ihug entertainment website. Later (either that evening or the following evening) over dinner at a restaurant with another friend of Mr Saleh’s, Ms Lee told him that she had found someone else to do the work. The group continued on to a party at which Ms Lee further offended Mr Saleh by allegedly shouting at another friend of his present there.

11. Mr Saleh said that he was upset and embarrassed as a result and in this context, went in the next morning and sent the e-mail from his computer there.

12. In a further written statement provided to the Authority in the course of the investigation, Mr Saleh changed his evidence regarding the text of the e-mail. He cited a different version that contained an additional line that read:

“Fuck Kat is that what I have to say to roger”

13. This version was contained in a bundle of further documentation provided to the Authority on 7 March.
14. The documentary record includes material that the applicant forwarded to his home when he left the respondent company as well as documents that have been made available by the respondent along the way. No-one was able to tell me quite when or how the document containing this version appeared. Nor did I get to the bottom of why there were two versions.
15. Counsel for the respondent argues that the respondent had never seen the longer version before and that the original must have been the shorter version, itself later doctored by the applicant. Ms Pienaar, Ms Lee, and Mr Robertson themselves all appeared genuinely, totally bemused by the existence of the two versions, and none could provide an explanation for it all. In addition, in its statement in reply (provided before the second version was produced by the applicant) under the heading ‘Other matters’ the respondent company had this to say:

“The company is concerned that on 22 December 2000 the applicant has deleted all files from the company laptop in his possession. All company records and files contained in this computer have been destroyed. It is for this reason and this reason alone that the company is now prevented from providing the Authority with records of what was contained on the applicant’s computer. Such action by the applicant constituted destruction of company property and is now causing the company obvious difficulties.

The company has also become aware that on the same day the files were destroyed the applicant proceeded to forward at least some of these files and records to his own personal e-mail address. The company would ask that a complete record of these documents be provided in hard copy to both the authority and the company.”

16. Counsel for the applicant has argued that the longer version must have been the original, and must have subsequently been changed by Ms Lee or someone else within the respondent company. He bases this on the premise that the longer version reflects better on Mr Saleh in that it can only be interpreted to indicate that he never intended Ms Lee to think the e-mail had actually gone to “Roger”. This explanation does not however explain the rather baffling fact that none of this was mentioned in the statement of problem or accompanying affidavit which referred to the shorter version. Nor is it consistent with Mr Saleh’s evidence about making out that the e-mail had gone to “Roger.” Finally it does not tally with the fact (as I find it to be) that Ms Lee did genuinely think the e-mail had gone to “Roger.”
17. The individuals involved in these proceedings are, of course, IT professionals, and I imagine, have the skills to engage in all sorts of creative manipulation of these exhibits. Both parties suggested to me that it would be possible, albeit time consuming, to track the original creation of the email and find out just what form it was in when it was sent to Ms Lee. I have decided that this will not be necessary, principally because the form in which the e-mail was sent is not, to my mind, determinative of the matter. Although I consider it more likely that Ms Lee received the shorter version of the e-mail, I am satisfied that whatever form it was in, she genuinely believed that it had gone to ‘Roger’ when it went to her. This was not an unreasonable conclusion to draw from either version, and so I find the additional line to be of less significance than the applicant would have it.
18. I also note that throughout the investigation there were numerous examples of inconsistencies in the evidence regarding times of e-mails, dates of meetings, and even whether a number of e-mails were genuine. Mr Saleh made some allegations that at best demonstrated confused recall, at worst appeared far-fetched and totally unsupported. For example, he alleged a certain e-mail under his name to Ms Lee had not been written by him, and was a complete fabrication. It was, however, of absolutely no significance, was not relied upon in any way by the respondent,

indeed was not referred to at all by any of the witnesses and seems to have entered the record only because e-mails for the day in question had been provided as a job lot. In short, there appeared to have been absolutely no reason at all why it would have been fabricated. Largely as a result of this, Mr Saleh did not impress me as a reliable witness. I am also conscious that it is not denied that he deleted a number of files from his computer when he left. This has not made it any easier for the respondent to present accurate information for its part. Although, as he said, it is possible for these to be retrieved, for me to require this now would put the respondent to expense, and cause further delays. As a result of all this, I preferred in general the evidence of the respondent witnesses, particularly Ms Pienaar who had kept records of meetings as one would expect of the human resources manager.

19. After sending her first apologetic e-mail, Ms Lee also attempted to discuss the matter with Mr Saleh over the telephone. However this did not resolve matters. She then sent him a further, more formal e-mail in which she instructed him to leave the premises. After he had left, she took his e-mail to human resources manager, Ms Pienaar. Ms Pienaar told the Authority that she found Ms Lee clearly upset and that she appeared to have been crying. For this reason she did not take a lot of detail from Ms Lee at that stage and advised her that she could have the rest of the day off.
20. Ms Pienaar did already consider the matter should be treated as a disciplinary one. However the next day, Friday, was the company Christmas party and no action was taken by her that day in respect of this matter. She met with Ms Lee again on Monday 18 December to hear what she had to say and heard briefly about what had led up to the incident. Ms Lee's account of this has consistently been much the same as that of the applicant, and included an acknowledgement from her that she had erred in giving the conversion work to someone else when it had been offered to Roger. Although the date is not known, Ms Lee was also interviewed by Mr Robertson about the incident, in order to confirm to him what she had told Ms Pienaar.
21. On 18 December Ms Pienaar notified the applicant of a disciplinary meeting to be conducted the next day. Although the applicant has never disputed that the e-mail was sent, he did not view his actions as serious at all and went into the meeting of 19 December feeling that there was no real risk he would lose his job. The meeting was attended by Ms Pienaar, Mr Robertson and Mr Organ, the respondent's representative. Mr Saleh was offered the opportunity to get legal representation but did not think it necessary. The company's two managers left the running of the meeting largely to Mr Organ. It was explained to Mr Saleh that the issue was not so much bad language or swearing, but actions amounting to personal abuse of his supervisor. It was put to Mr Saleh that his actions were taken very seriously by the company and had broken the trust in the employment relationship.
22. One of the issues Mr Saleh has raised in connection with his grievance is that he feels the respondent was not interested in the background to his action or what he sees as the justification for it. However he does acknowledge that he was asked, during the disciplinary meetings, why he had sent the e-mail. His affidavit records that he:

"...told the people present the background to our relationship and the fact that I cannot work with her as my superior"
23. Mr Saleh told the Authority that his purpose in sending the e-mail was to express how upset he was and to show Ms Lee that he was hurt, personally and professionally. The relationship between Ms Lee and Mr Saleh struck the Authority as unusual in that they socialised together and appeared to get on well on a personal level. Mr Saleh said in his statement of evidence that he

“liked Kat as a friend. There was never a dull moment with her crazy up front, loud attitude.”

24. However, he found their working relationship impossible. He seems to have seen her behaviour in respect of the work for ‘Roger’ as typical of her management style, of which he was highly critical. One month after his employment, company director Nick Wood held a meeting with Ms Lee and the applicant in an attempt to improve the working relationship between them, and prevent the applicant’s threatened resignation. As a result of the meeting, Mr Saleh agreed to stay on with the company. However, from his point of view, it had not succeeded and he felt that by 14 December he had exhausted all his options for resolving the problems in his relationship with Ms Lee.
25. The meeting of 19 December ended, from the respondent’s point of view, with Mr Saleh being sent away to think over what had been said and to consider whether he had anything more to put in response. (There was some dispute from Mr Saleh that this was in fact how things stood at the end of the meeting. However I am satisfied that in all the circumstances, any confusion at that point did not prejudice him in any way. This is because the disciplinary process continued through two further meetings over three more weeks.)
26. Mr Saleh did follow up after the meeting with an e-mail to Ms Pienaar on 20 December. It reads:

“In regards to our conversation yesterday afternoon.
 Firstly, I am sorry for my attitude towards Kat. Kat and
 Myself often swear at each other and I have always believed
 We are both thick skinned enough to handle it, it has never been a problem until now. If I reported Kat every time
 she used abusive language we would be in your office every day.
 I have given my position at Ihug a great deal of thought and I
 Really want to finish my project here.
 I am prepared to work with Kat, but I am not prepared
 To work with Kat as my boss. Kat’s work ethic’s professionalism and honesty are very different to mine and I do
 not want my own reputation inside
 And outside of Ihug tarnished.”

27. This e-mail concluded with some general remarks about his work relationships.
28. A second meeting took place on 21 December. It lasted over two hours, with breaks. It went over much of the same ground. Mr Saleh now realised that his employment was at risk. Mr Robertson told the Authority that he had asked Mr Saleh what he thought should be done about the situation. Mr Saleh’s response was essentially that there would not be a problem if he did not have to work with Ms Lee. For Mr Robertson, the issue was between the applicant and the company, not the applicant and Ms Lee, and he put this to the applicant. He felt that the applicant appeared to view his behaviour as justified and showed no regret about his actions. Although Mr Robertson said he could not say at which meeting it was, he recalled Mr Saleh saying:

“I’d like to say it won’t happen again, but with Kat Lee the way she is, I’d be lying if I did.”

29. Towards the conclusion of this meeting there was some discussion that Mr Saleh might resign, however he thought better of this and decided to seek legal advice before doing anything further. The disciplinary process was halted while he did so. Christmas intervened, and Mr Saleh’s legal advisor was unavailable meanwhile. Mr Saleh was not formally suspended and had continuing access to the respondent’s offices. He spent much of the holiday period on outside work previously approved by the respondent.

30. The process resumed with a meeting on January 12. Although Mr Saleh's now had an advisor present, he chose not to say anything more to Ms Pienaar or Mr Robertson.
31. I note that the it is common ground that Mr Saleh's skills were highly valued by the company. Mr Robertson gave very convincing evidence that he was extremely reluctant to dismiss Mr Saleh because he was so badly needed. His words were, "*as manager of that department I was looking desperately for a way out [of dismissing Mr Saleh]*"
32. The final decision to dismiss rested not with him, but with Ms Pienaar. However, by the end of the second meeting, Mr Robertson did not feel there was anything more he could say to Ms Pienaar to advocate keeping Mr Saleh on.
33. The company says it had considered a number of issues including the following:
- That the applicant expressed no regret for his actions and expressed a severe dislike for his manager
 - He had stated he could not work with her or trust her
 - The company considered it was under a duty to act appropriately once the matter had been reported to it.
 - The company was under a duty to provide the manager with a safe environment
 - The respondent was concerned about what would happen if the employment relationship continued
 - The fact that the action was planned and pre-meditated
 - The respondent could see no justification for the conduct
 - The applicant's advisor put nothing forward by way of explanation or defence of his actions.
34. After a short break the meeting resumed and Mr Saleh was informed that he was summarily dismissed. Later, by letter dated 18 January, the company informed him that:
- he was dismissed for sending the e-mail of 14 December
 - comments made by him during the meetings that followed were also totally unacceptable.
35. These comments were said to have included, amongst others, the following:
- He could not work with Ms Lee
 - He could not trust Ms Lee
 - His purpose in sending the e-mail was to frighten Ms Lee
 - "I handled it in an aggressive manner I had no option."
 - He would only apologise to Ms Lee if this meant that he could keep his job.
36. Through Counsel, Mr Saleh immediately denied making the latter three comments. However, during the course of the Authority's investigation it became clear that he had made comments to the same effect, although the exact words used may have differed. He has confirmed repeatedly that he would not work with Ms Lee.
37. The applicant believes his dismissal is unjustified because:
- His actions did not warrant summary dismissal
 - The copy of the email forwarded by the applicant to his superior on 14 December 2000 was in keeping with the language used by both parties on a daily basis.

- The applicant's superior has not been subjected to disciplinary action as a result of the language she uses and so there has been a disparity of treatment
- The applicant has been treated in an unfair and unreasonable manner.

Conclusions

38. Very early on in the course of the investigation, before the meeting, I clarified with the respondent the basis upon which it justified the dismissal. I accepted then that the applicant and Ms Lee shared a propensity to use language that others might consider "over the top" and that it would have been difficult for the respondent to justify the dismissal on the basis of use of bad language alone. It was confirmed by the company that the principal reason for the dismissal was not so much use of bad language *per se* (although it denies that the use of such language is commonplace or condoned in the workplace) but the fact that the e-mail had contained *direct personal abuse* of Ms Lee that was particularly serious in nature. As we have seen, the company also says that further justification emerged, in terms of Mr Saleh's expressed attitudes during the course of its investigation of the conduct.
39. Since the justification of the dismissal does not rest on the use of bad language, I do not need to deal with the applicant's arguments about acceptance of bad language and disparity of treatment in respect of such language.
40. It is well established that even in a "robust" environment, where use of bad language is the norm, direct personal abuse may be viewed very differently from liberal use of swear words that are not directed at any individual. It is also well established that abuse of a supervisor may be treated more seriously than abuse between individuals on the same level within an organisation. Case law also abounds on the issue of what words or conduct will constitute abuse and when it will amount to serious misconduct such as to justify summary dismissal. Perusal of examples in the last category shows that the context and circumstances can be taken into consideration.
41. Essentially that is Mr Saleh's case. In all the circumstances here, he believes his actions should not have been taken as seriously as they were, because of the person to whom he was speaking and the events that led up to it. He believes that Ms Lee was not distressed, and that she was an insensitive individual to whom bad language and personal insults were like water off a duck's back. He believed that she was impossible to work with and his actions were justified by her behaviour. Lastly, he believes the company treated him unfairly in failing to take this into consideration.
42. I reject all the arguments put forward on Mr Saleh's behalf in their entirety. I have no doubt that the abuse in the e-mail was at the extreme end of the scale, by any standards I have encountered in any workplace. I accept that Ms Lee was very distressed and intimidated by what happened, and the way it happened. In all the circumstances, I accept that even a very thick-skinned individual would have been. The abuse was compounded by being premeditated, by being in writing and by being made out to have gone to a third party. Nothing in the circumstances mitigates it. I find it remarkable that a highly skilled professional could say he saw this as the only way to resolve a problem in the workplace, and remain baffled as to what he thought his action could possibly achieve. Mr Saleh may well have had valid concerns in respect of Ms Lee's competence and professionalism, but that does not relieve him from responsibility for his own behaviour.
43. I also accept (as the company found) that Mr Saleh's complete inability or refusal to accept that responsibility only compounded his misconduct. This lack of self awareness and judgement in itself rendered him unfit for a senior position and was sufficient to destroy the trust and

confidence in the employment relationship. I accept that the attitudes Mr Saleh expressed during the course of the investigation also justified dismissal in themselves. For completeness I note that I see Ms Lee's redundancy (in contemplation by the time of the actual dismissal) as irrelevant. Mr Saleh's attitude and approach was clearly capable of affecting other working relationships, not just that with Ms Lee, and the issue was, as Mr Robertson has said, between the applicant and the company not him and Ms Lee.

44. Finally, I accept that the respondent's investigation was procedurally fair and not, as the applicant has tried to say, shallow in its nature. In particular I accept that the applicant received a full hearing on all the issues he wished to raise and that all the information, including background on his working relationship with Ms Lee, was fully considered. At the end of the day, this case has turned essentially on substantive justification. The applicant, quite simply, does not think his behaviour to be as serious as does the respondent, but I must conclude that there is no doubt that the respondent's view of the conduct is open to it as a reasonable employer.
45. The applicant's dismissal was, I find, justified, and he does not have a personal grievance. I can do nothing further in respect of his employment problem.

Costs.

46. I invite that parties to come to an agreement on the issue of costs. If they cannot, I will accept submission on costs at any time within the next fourteen days.

47. Y S Oldfield

48. Member of Employment Relations Authority