

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 291/07
5090232**

BETWEEN MAHESH SHARMA
Applicant
AND MEDICTRONIX NEW ZEALAND
LIMITED
Respondent

Member of Authority: Leon Robinson
Representatives: Applicant In Person
No appearance for Respondent
Investigation Meeting: 18 September 2007
Determination: 18 September 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Mahesh Sharma ("Mr Sharma") says he was unjustifiably dismissed from his former employment with Medictronix New Zealand Limited ("Medictronix"). Medictronix does not defend Mr Sharma's claim.

[2] Medictronix did not attend the investigation meeting today. Nor has it taken any steps previously to defend the claim against it.

[3] Mr Sharma properly lodged his statement of problem in the Authority on 13 June 2007. That statement of problem was received by Medictronix on 12 July 2006. Medictronix failed to lodge its statement in reply within the prescribed period. By memorandum of 6 August 2007, I fixed the time for investigation meeting to today and directed that Medictronix be served with a notice of today's investigation meeting and my memorandum. The memorandum particularly invited Medictronix to attend the investigation meeting today to seek leave to defend Mr Sharma's claim.

[4] I am satisfied that the notice of investigation meeting and my memorandum of 6 August 2007 have been served on Medictronix. Medictronix fails to attend today to seek leave.

[5] A director of Medictronix Mr Richard Warby ("Mr Warby") telephoned the Authority support office at 9.45am this morning and advised that Medictronix would not be attending today as it is attending to other matters. That is its choice. But as it has not sought leave to defend the claim against, I proceed on the basis that the matter is undefended. Mr Sharma's evidence is unchallenged.

[6] Because of Medictronix's failure to take any steps, the parties have not attended mediation.

The facts

[7] Mr Sharma commenced employment with Medictronix in September 2005. He was employed as its Sales and Marketing Manager. His remuneration included a salary of \$35,000.00, a company car, fuel card and commission of 8% on his sales. The terms of the employment were recorded in an individual written employment agreement signed by both parties on 19 August 2005 ("the Agreement").

[8] In November 2006, Mr Sharma was required to travel to India to attend to outstanding accounting matters relating to a previous business interest as well as, his ill mother-in-law. He expected he would remain in India for three months. I find that Mr Sharma and Mr Warby agreed that Mr Sharma would take three months leave in respect of this travel and return to work on 13 February 2007. I find that they agreed Mr Sharma would take the first month as paid leave and the remaining two months as unpaid leave. However, I further find that Mr Warby agreed to pay Mr Sharma a weekly amount equal to his base salary and in reduction of outstanding commissions owed to Mr Sharma. I find that at that time Mr Sharma had not been paid any commission that he had earned on his sales.

[9] Mr Sharma worked until Friday 10 November 2006 and travelled to India on Tuesday 14 November 2006.

[10] Contrary to what had been agreed, Medictronix did not pay Mr Sharma anything while he was away. While he was in India Mr Sharma continued to email Mr Warby requesting payment according to what had been agreed.

[11] Mr Sharma returned to New Zealand on 12 or 13 February 2007. On 14 February 2007 he met with Mr Warby. I accept Mr Sharma's evidence that Mr Warby told him "*things [were] not good*" and that no staff had been paid. I find Mr Warby agreed to pay Mr Sharma two weeks salary being two weeks annual leave for November 2006. I find he also told Mr Sharma he would speak with his accountant about the outstanding commission owed to Mr Sharma. I further find he told Mr Sharma he would contact Mr Sharma again about when Mr Sharma could resume his duties.

[12] Despite Mr Sharma's repeated contact with Mr Warby, Mr Sharma was not subsequently invited to resume his duties. By email of 7 March 2007 Mr Sharma wrote to Mr Warby and the other director as follows¹:-

Dear Richard & John

I have been requesting for my commission to be paid with wages from a long time now. I have also been requesting Richard to let me know when can I join back and see no reason why I should not be reinstated. I have seeked legal opinion and have been informed that I have been dismissed unfairly and money owed to me should have been paid to me and I should have been reinstated in my job after coming back. This is my last request to you to let me know by Friday the 9th of March, 2007 by 4pm as when can I join back and for you to pay me my commission and wages which have been unfairly deducted. I have my commission statements printed out from Medictronix System given to me by both Betty & Debbie though this statement is not complete and a lot of my sales have not been reflected in the statement which is for \$130,000.00 ++. I request you to do the needful to avoid legal proceedings.

Regards

Mahesh

[13] I find that Medictronix responded in a retaliatory way by sending to Mr Sharma that same day by post a letter which was dated 14 February 2007 and which stated:-

February 14th 2007

Dear Mahesh

It is with regret that I have to inform you that your position of Sales and Marketing Manager has been made redundant due to circumstances beyond our control.

¹ English is Mr Sharma's second language

*Thank you for all the effort that you have put in over the past year and I wish you all the best in your future endeavours.
Please feel free to use me as a reference.
Yours faithfully
Richard Warby
Director
Medictronix New Zealand Ltd*

[14] I find that this letter, notwithstanding its marked date, was actually sent to Mr Sharma on 7 March 2007, the same day as his email to Medictronix. I have sighted the original letter and the original envelope in which it was posted to Mr Sharma and the postal markings showing 7 March 2007 as the date of posting².

The merits

[15] I find that the advice of termination for redundancy in the letter dated 14 February (but posted on 7 March 2007) was contrived and that the purported termination for redundancy was a complete sham.

[16] The termination as advised was also in breach of the express terms of the Agreement. Clause 24 of the Agreement provides:-

24.2 In the event that the Employer proposes to declare the position of the Employee redundant, the Employer shall:

- (a) consult with the Employee a reasonable time in advance over its intention before arriving at a final decision to give notice of termination of employment;*
- (b) give the Employee such reasonable time off work while working out any period of notice as may be necessary to enable the Employee to seek alternative employment and in the event that the Employee finds alternative employment during the notice period, allow the Employee to terminate the employment not less than one week after the date that written notice was given;*
- (c) provide the Employee with a reasonable period of notice.*

24.3 The Employee acknowledges that the Employee shall not be entitled to any form of redundancy payment.

[17] Mr Sharma was given no advance notice of any proposal to make his position redundant and I find that in these particular circumstances such consultation was practicable. I find there was no consultation with him whatsoever. This lack of consultation was a breach of the obligations owed to Mr Sharma by the express terms of the Agreement but also in terms of the statutory duty of good faith at section 4 of the *Employment Relations Act 2000* ("the Act"). I find that this dismissal was tainted

² Once sighted, I handed these original documents back to Mr Sharma.

by so much unfairness that it was unjustifiable.

[18] I conclude the dismissal does not satisfy the test of justification prescribed by section 103A of the Act. **I find that Mr Sharma was unjustifiably dismissed. He is entitled to remedies in settlement of that personal grievance.**

The resolution

[19] Having made the above findings 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 Mr Sharma's actions 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 find that Mr Sharma did not contribute to the situation that led to his unjustifiable dismissal and there is no basis to reduce either the nature or the extent of any remedies awarded to him.**

[20] As this was a sham and not a genuine redundancy, I consider it appropriate to award, and I am satisfied that Mr Sharma has lost, remuneration as a result of the unlawful termination of his employment. I am satisfied that he took sufficient steps to mitigate his losses and subsequently did in fact successfully obtain alternative employment. I award him lost remuneration being his weekly salary from 14 February 2007 until his first payment of salary in his alternative employment on 20 April 2007. I calculate that gross sum as \$6,057.70 (being 9 weeks @ \$673.08 per week). **I order Medictronix New Zealand Limited to pay to Mahesh Sharma the gross sum of \$6,057.70 as reimbursement.**

[21] Mr Sharma tells the Authority of the stress he endured because he was unable to support his wife and two young children without income. Nor was he able to service the mortgage on the family home. He had relied significantly on Mr Warby's undertakings. He found it humiliating having to borrow money from his wife's father in India. It causes him much anxiety that his family savings have now been significantly depleted because he has had to draw on them to fund his family's daily living expenses.

[22] I am satisfied that Mr Sharma has suffered hurt and humiliation, loss of dignity

and injury to his feelings. He has suffered that injury as a result of the unjustifiable dismissal. Having regard to his evidence, his length of service and the circumstances of the personal grievance, I award him compensation of \$8,000.00. **I order Medictronix New Zealand Limited to pay to Mahesh Sharma the sum of \$8,000.00 as compensation.**

[23] I accept Mr Sharma's unchallenged evidence and I am satisfied that he was not paid any commission during the entire time of his service. I am satisfied that he is owed commission on total sales of \$130,642.06 and in the gross sum of \$10,451.36. **I order Medictronix New Zealand Limited to pay to Mahesh Sharma the sum of \$10,451.36 as arrears of wages.**

[24] As Mr Sharma has stood out of his commissions since the termination of his employment, I think it fit he have interest on it. **I order Medictronix New Zealand Limited to pay to Mahesh Sharma interest on the sum of \$10,451.36 at the rate of 10% per annum from 14 February 2007 until the date of payment.**

[25] Finally Mr Sharma claims a penalty for Medictronix's failure to act towards him in good faith.

[26] The Act has as one of its principal objectives the imposition of good faith behaviour in employment relationships. While initially it did not impose the duty under sufferance of a punitive sanction, a subsequent amendment Act did. The honeymoon period has long expired.

[27] I refer to the Medictronix advice marked 14 February 2007 but posted on 7 March 2007. I have earlier said that advice was contrived. I find it was retaliatory and evidenced a sham. While Medictronix engaged in a dialogue with Mr Sharma instilling in him an expectation of a future resumption of his duties, it then upon receipt of his email, dishonestly sought to revise the prevailing state of affairs by deeming him redundant as from the commencement of the discussions with him. That conduct was demonstratively dishonest, in bad faith and is not to be condoned. I find that this conduct was a failure to comply with the duty of good faith owed to Mr Sharma and which I further find, was intended to undermine Mr Sharma's individual employment agreement and did in fact have that effect as it was, terminating the

relationship.

[28] Quite independently from resolving the problem in Mr Sharma's favour and granting remedies to him by way of redress, I consider it both necessary and desirable to now underscore the policy objectives of the Act and denounce Medictronix's conduct. I do so by the imposition of a penalty which I am satisfied is appropriate and warranted. **I order Medictronix New Zealand Limited to pay a penalty of \$3,000.00 pursuant to section 4A(b)(ii) of the Act.** That penalty is to be paid into the Authority to be paid into the Crown Bank Account.

Costs

[29] As Mr Sharma was not represented by professional advocate, I make no orders on costs.

Leon Robinson

Member of Employment Relations Authority

Summary of Orders

Medictronix New Zealand Limited is ordered:-

- (i) to pay to Mahesh Sharma the gross sum of \$6,057.08 as reimbursement; &
- (ii) to pay to Mahesh Sharma the sum of \$8,000.00 as compensation; &
- (iii) to pay to Mahesh Sharma the sum of \$10,451.36 as arrears of wages; &
- (iv) to pay to Mahesh Sharma interest on the sum of \$10,451.36 at the rate of 10% per annum from 14 February 2007 until the date of payment; &
- (v) to pay into the Authority for payment into the Crown Bank Account, a penalty pursuant to section 4A(b)(ii) of the Employments Relations Act 2000, of \$3,000.00.