IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 151/09
5140494

	BETWEEN	GYANENDRAJI SINGH Applicant
	AND	DISTRICT HEALTH BOARDS OF NEW ZEALAND INCORPORATED Respondent

Member of Authority:	Leon Robinson
Representatives:	Applicant In Person Nicola Ridder, Counsel for Respondent
Investigation Meeting:	15 December 2008
Further Information:	8 May 2009
Determination:	12 May 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Gyanendraji Singh ("Mr Singh") has been employed by District Health Boards of New Zealand Incorporated ("DHBNZ") as an Employment Relations Specialist since November 2007. The terms of the employment were recorded in a written individual employment agreement effective from 1 November 2007 ("the IEA")

[2] Mr Singh by his first statement of problem claimed he had these problems with his employer:-

(a) unjustified disadvantage;
(b) breach of good faith;
(c) unfair bargaining;
(d) breach of natural justice.

[3] By a further amended statement of problem he added these further problems:-

(a) unjustified action causing disadvantage and unfair process;

(b) curtailment of his rights in pursuing his grievance;

(c) breach of privilege.

[4] The parties were unable to resolve the problems between them by mediation.

The facts

[5] In April 2008 DHBNZ commenced an investigation into Mr Singh's performance. There was a meeting held on 8 April 2008 at which both parties were represented. The parties agreed the investigation be "put on hold" in order to pursue and explore informal discussions directed at resolution.

[6] The informal discussions did not resolve concerns both parties had articulated through that process. Consequently, DHBNZ resumed the formal investigation and two formal meetings were held in that context with Mr Singh in October and November 2008 about his performance.

[7] A third meeting was held with Mr Singh at which he was advised of DHBNZ's interim decision and to permit him to provide any response he wished to make before a final decision was made.

[8] On 3 December 2008 Mr Singh's manager Mr Steve Aburn ("Mr Aburn") wrote to advise Mr Singh his final decision was to recommend to DHBNZ's chief executive officer Mr Julian Inch ("Mr Inch") that Mr Singh be issued with a formal warning for misconduct.

[9] On 5 December 2008 Mr Inch issued a formal written warning to Mr Singh materially this:-

> *I am in receipt of the letter from your Manager Steve Aburn to you dated 3rd December advising you of his Final Decision in respect of your performance in the Employment Relations Specialist role.*
> *I have reviewed the letter and associated material and am satisfied that a Written Warning is appropriate.*
> *This letter formally advises you that your job performance has been unsatisfactory over a sustained period of time despite support and guidance from the organisation.*

> ***I consider this to be consistent with misconduct as defined in the DHBNZ Policy on Employee Conduct and Discipline, and therefore you are issued with a written warning regarding your performance, which remains in effect for six (6) months from today's date (through until 5th June 2009).***
> *I am seriously concerned about the effect that this misconduct has had and will continue to have on DHBNZ's reputation and image with its member DHBs and with the wider health sector. These impacts are more far-reaching than your immediate employment relationship. I will arrange to meet with you to discuss this issue.*
> (original emphasis)

The merits

[10] There is a prescribed test of justification set out at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

> *103A. Test of justification*
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 or action occurred.*

[11] DHBNZ has a policy document entitled *Policy on Employee Conduct and Discipline*. It details a procedure, investigation and disciplinary action in relation to misconduct and serious misconduct.

[12] The principles relevant in the management of poor performance in a disciplinary setting are set out in *Trotter -v- Telecom Corporation of New Zealand Limited*[1].

[13] It is against the above factual background that Mr Singh now raises his various claims set out above.

Misrepresentation of salary

[14] Mr Aburn offered employment to Mr Singh on 26 September 2007 at a salary of $100k and an at risk component of $5k. That offer was advised to be valid until 28 September 2007. The following day Mr Singh asked Mr Aburn to review that salary but Mr Aburn declined.

[1] [1993] 2 ERNZ 659.

[15] Mr Singh says that on 26 September 2007 Mr Aburn misrepresented that his salary was equitable with other national Employment Relations Specialists employed by DHBNZ. Mr Singh says he was "completely misled".

[16] Mr Aburn adamantly denies divulging details of individual employees' remuneration. Mr Aburn says he does recall he likely said to Mr Singh "…the offer is within cooee of other team members" and further, that he also advised Mr Singh that there would be team members earning more than him and others earning less than him. Mr Aburn is certain he did not refer to "senior" Employment Relations Specialists as the comparator.

[17] Mr Singh subsequently gleaned information suggesting his salary was not "equitable" or within a similar range of that paid to his colleagues performing the same role. Mr Singh says his reference point is direct conversations with those other colleagues. He says he learned national employment relations specialists were commenced on salaries between $115k to $125k.

[18] I have been assisted by Mr Mick Prior who has informed the Authority he told Mr Singh his own understanding of the relevant salary band was between $110k and $130k. He further says that Mr Singh asked him what his own salary was he said "somewhere in the middle". Mr Singh says that as a result of the discussions he had with Mr Aburn, he was left with the impression the relevant salary band was $100k to $110k. Mr Singh complains he was misled by Mr Aburn in the negotiations for his employment and in the same is an incident of unfair bargaining as well as that he had only two days to consider the offer.

[19] I have also been assisted by Mr Kevin McFadgen. Mr McFadgen recalls a conversation with Mr Singh where Mr Singh enquired as to salary range. Mr McFadgen cannot recall the particular figures he identified. He says he did not specify his own salary to Mr Singh.

[20] I did not consider it necessary or desirable to seek Mr Len McFarlane's assistance. Enquiries ought to be as least intrusive as possible and unnecessary disharmony avoided. I have derived the assistance I require to determine the issue.

[21] Mr Singh approached Mr Inch about his salary concerns. Mr Inch referred him back to Mr Aburn. The parties attended mediation about the matter. Mr Singh says that shortly after that unsuccessful attempt at informal resolution, DHBNZ raised performance issues with him. Mr Singh says his employer's performance concerns is not *bona fide* but rather is retaliatory in nature.

[22] It is not appropriate that I accept evidence relating to "off the record" or without prejudice meetings. I do not do so.

[23] At the time of his negotiations for his employment, Mr Singh declared to Mr Aburn that "his information was that the range was between $115,000 and $130,000 with the higher end over $120,000 for those considered senior. Mr Singh was not any more specific than that. Mr Aburn was then expressly aware of what Mr Singh's expectation was.

[24] Mr Singh is employed as an Employment Relations Specialist. He is an advocate in contractual negotiations. He is not to be regarded as unsophisticated or a person at a disadvantage in negotiations for employment or advocacy. I find that section 68 of the Act has no application here.

[25] I accept the salary range for persons employed in Mr Singh's position is $110k to $130k. He was offered $105k. That I consider was "within cooee" of the relevant salary band. Accordingly, I do not accept that Mr Aburn misled Mr Singh, or that Mr Singh suffered disadvantage. **Consequently, I see no cause for the Authority intervening and I decline to make any formal orders in relation to this claim.**

Imposition of performance review process

[26] Mr Singh says DHBNZ's imposition of a performance review process was designed "for the sole purpose of providing [Mr Aburn] with leverage in [their] discussions and/or for the purpose of coercing [him] to resign, and without any genuine or reasonable grounds to justify any concerns about [his] performance".

[27] I find no foundation to support that allegation and nor am I persuaded to draw such an inference.

[28] The IEA entitles DHBNZ to "from time to time, either generally or in respect of any particular matter" review Mr Singh's performance. That is what it has done and is entitled to do.

[29] **I decline to make any formal orders in relation to this claim.**

Salary increase

[30] By letter dated 3 April 2008, Mr Aburn wrote to Mr Singh advising he had concerns about Mr Singh's performance. He stated that he was concerned that Mr Singh's overall level of performance was below the level expected of an experienced and senior professional. There were six items of concern explicitly identified. Mr Aburn summoned Mr Singh to meet with him to discuss his concerns in a meeting on 8 April 2008.

[31] I find that in a meeting held on 18 April 2008 Mr Singh acknowledged the stated concerns with his performance.

[32] By letter dated 6 May 2008 Mr Aburn purported to confirm a pragmatic compromise reached between the parties. Mr Singh was advised that to be eligible for payment of bonus and a salary review he was required to deliver on various specified "behaviours, goals and objectives". Mr Singh objected to this advice in essence because the compromise reached arose out of off-the-record and without prejudice prior discussions. Mr Aburn subsequently prepared a document entitled "memorandum of understanding" purporting to better reflect the compromise reached. But there was no agreement reached and the intended informal resolution was not concluded.

[33] On 15 July 2008 Mr Aburn met with Mr Singh to review Mr Singh's performance. Mr Aburn agreed that if certain objectives were met, that he would review Mr Singh's remuneration.

[34] By letter dated 14 August 2008 Mr Aburn wrote to Mr Singh setting out his assessment of the behaviours, goals and objectives he had previously identified he required of Mr Singh in order for Mr Singh to be paid his bonus and to have his salary reviewed. While Mr Aburn acknowledged there had been significant improvement in

many areas, his ultimate conclusion was that Mr Singh had not reached the standard of consistent performance against specified objectives he expected of a senior ER professional. He confirmed he would not be recommending an adjustment to Mr Singh's salary. In recognition of Mr Singh's improvement, he advised Mr Singh would be paid a partial bonus of $2,000.00.

[35] Mr Singh wrote by letter dated 29 September 2008 requesting Mr Aburn "put the situation right" by increasing his salary to a minimum of $120,000 plus an at risk component of $5,000. He said if Mr Aburn did not agree, he would pursue matters to the Authority.

[36] Mr Aburn wrote by letter dated 1 October 2008 declining Mr Singh's request and advising the suspension of the formal process was at an end.

[37] By letter dated 15 October 2008, Mr Singh was advised he was required to attend a meeting on 21 October 2008 at which he could respond to identified concerns about his performance.

[38] By clause 4.2 of his individual employment agreement, Mr Singh was entitled to have his salary reviewed at intervals of not more than 12 months. The first such review was therefore required no later than 1 November 2008. Mr Singh has no right to a salary increase. Rather, he is entitled to have his employer review his salary each year. Any such review must take account of his performance in accordance with clause 6 of the IEA.

[39] By Mr Aburn's letter of 14 August 2008, satisfies me that Mr Singh's salary was in fact reviewed. It was Mr Aburn's view that Mr Singh, because of his performance, was not worthy of an increase in remuneration. Mr Singh received the review he was entitled to.

[40] **Accordingly**, **I decline to make any formal orders in relation to this claim.**

At risk component

[41] By Schedule 2 of the IEA, Mr Singh was entitled to an at risk component of $5,000 "assessed against KPIs for specific projects as agreed" and assessed and paid six monthly.

[42] The first assessment was due before the end of April 2008. The second assessment was then due before the end of October 2008.

[43] In his advice of 14 August 2008, Mr Aburn wrote that in recognition of Mr Singh's improvement, Mr Singh would be paid a partial bonus of $2,000.00.

[44] DHBNZ was not entitled to proceed in the way Mr Aburn did. Firstly, I am not satisfied that there was an assessment against identified "KPIs for specific projects" and "as agreed". Secondly, there were two separate assessments required as I have earlier identified, and not one assessment in August.

[45] But it is not for this Authority to substitute or impose KPIs. The parties agreed to agree. They have failed to do so. There is an omission on both sides. There being no agreed KPIs, there is no payment to enforce.

[46] Mr Singh has been paid $2,000.00. He has received that payment outside the contractually agreed terms. Because I consider the failure to agree KPIs is an omission by both parties, **I decline to intervene with any formal orders and consider it wholly inappropriate to do so.**

The warning of 5 December 2008

[47] Mr Inch advised Mr Singh his job performance had been unsatisfactory over a sustained period of time, despite support and guidance from the organisation. Mr Inch advised he considered the situation constituted misconduct and issued Mr Singh with a written warning regarding his performance remaining in effect until 5 June 2009.

[48] I consider it was fair and reasonable for DHBNZ to conclude that Mr Singh had failed to ensure the deliver of contractually required reports to the Department of Labour on the due dates of 15 January, 31 March and 15 June and such failure constituted unsatisfactory performance. In particular, I consider it was fair and reasonable for DHBNZ to reject Mr Singh's response that he had negotiated an

extended due date. Whether or not that was so, I agree that such a response misses the point. Mr Singh had failed to meet his duty to his employer. His subsequent mendacity as apparent from his continued protests, serves to underscore his lack of appreciation and insight.

[49] I also consider that DHBNZ acted fairly and reasonable in the way that it reached the conclusion it did. Mr Singh was given full opportunity to address the matter and did in fact do so.

[50] In accordance with its own Delegated Authority Policy, DHBNZ delegated the authority to issue written warnings to its CEO. Mr Inch issued a written warning to Mr Singh by the letter dated 5 December 2008 as he was authorised to do. That warning was on Mr Auburn's recommendation.

[51] However, I accept as a matter of law, that the employee is entitled to be heard by the decision maker before the decision maker makes the decision. In the present case, I accept that Mr Singh was not heard by Mr Inch. The right to be heard is a right to be heard by the decision-maker[2]. I do not accept that the right to be heard by the decision maker can be delegated. Such a right is fundamental. Accordingly, I therefore find that Mr Singh was not heard by Mr Inch before Mr Inch made the decision to issue Mr Singh with a written warning. **I am led to find that the written warning of 5 December 2008 was unjustifiable. I find that Mr Singh has a personal grievance for unjustifiable disadvantage**. The warning cannot have any effect accordingly.

[52] As a matter of law too, only proved losses are compensable. I have no doubt that had Mr Inch heard Mr Singh in person, he would have reached the same decision as that recommended to him by Mr Aburn. That being so, it cannot be said that Mr Singh has suffered any loss for which he ought to be compensated in remedies. **I therefore decline to make any formal orders as sought in relation to this claim beyond my substantive determination that the said written warning is unjustifiable.**

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[2] *Quinn -v- Bank of New Zealand Limited* [1991] 1 ERNZ 1060, Goddard CJ

[53] It is unnecessary for me to make any findings in relation to contribution. I invite DHBNZ to revisit its delegation policy having regard to my determination.

Other matters

[54] It is DHBNZ's prerogative to manage its workplace as it sees fit. It is entitled to review Mr Singh's performance as part of that prerogative but also because it is contractually agreed it is so permitted.

[55] I do not accept that penalties are warranted in this problem and I decline to order the same.

[56] I have not concerned myself with all of Mr Singh's various expressed complaints for example his Koru club membership, his "disgusting" and "decrepit" office or gifted leave not extended to him. I consider I have dealt with the material aspects of the employment relationship problem between these parties.

The costs

[57] I do not expect to be asked to address costs as Mr Singh was not represented by professional advocate. If either party wishes to be heard on costs, they must make a case for the same by memorandum lodged within 14 days of the date of this Determination. I will not consider any application lodged outside that time without leave.

Leon Robinson
Member of Employment Relations Authority