

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 244/10
5107951**

BETWEEN THAMER RADHI THAMER
Applicant

AND ELECTRONIC COMPANY OF NEW
ZEALAND (1971) LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
Dean Organ, Advocate for Respondent

Investigation Meeting: 27 May 2008
28 August 2008
13 October 2008

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Thamer Radhi Thamer (“Mr Thamer”) asks the Authority to investigate the termination of his employment with Electronic Company of New Zealand (1971) Limited ("ECONZ") which he says is unjustifiable. He asks the Authority to resolve the problem by making formal orders for his reinstatement, reimbursement, and compensation. ECONZ defends Mr Thamer's application and says the termination is entirely justifiable

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Mr Thamer commenced employment with ECONZ on 8 October 2007 as Oracle Database Administrator. The terms of the employment were recorded in writing but although not signed by the parties, they agree reflects the agreement between them.

[4] On 11 October 2007, the departing Oracle Database Administrator Ms Nalini Sen ("Ms Sen") became seriously concerned about Mr Thamer's skills as she had observed them. She communicated her concerns to the support manager Ms Nicky Lowrie ("Ms Lowrie"). Ms Sen prepared a summary of her conclusions in relation to Mr Thamer's skills and knowledge since handing over to him. The Technical manager Mr Alex Chau also had serious concerns about Mr Thamer's skills and abilities

[5] Ms Lowrie wrote to Mr Thamer by letter dated 23 October 2007 but received by him by email on the evening of 24 October 2007. The letter materially stated:-

Re: Notice of Disciplinary Meeting

1. *This letter is to advise you that you are required to attend a meeting to be held on Thursday 25 October 2007 at 3.00pm at ECONZ Wireless Ltd's office at 19 Newton Road, Newton, Auckland. The meeting relates to our concerns, which are detailed in this letter and in the attached reports.*

2. *We have serious concerns that you do not appear to possess the fundamental skills and abilities to perform the requirements of your position as an Oracle Database Administrator, operating in a sole charge role.*

3. *We are concerned that you will not be able to provide the level of support that is required by our clients.*

4. *You appear to not have the capability to resolve production problems in a timely manner.*

5. *We cannot run the risk of having an employee with apparent serious deficiencies in knowledge and skills in the position of Oracle Database Administrator. An incorrect command by you, even if unintentional, could bring mission-critical applications down.*

6. *Our observations to date of your skills and knowledge is that these are contrary to the representations and the information contained in your CV and references. Accordingly the veracity of these has to be put into question.*

7. *Our concerns appear too significant to simply be associated with your being in a new environment and unfamiliar with the database structure.*

...

11. *You will have the opportunity at the meeting to provide an explanation to our concerns. Based on our findings from the meeting, disciplinary action - including dismissal - may possibly result. However, no decision as to the outcome will be made until we have heard what you have to say.*

12. *You are entitled to have a representative or support person present at the meeting.*
Yours faithfully
Nicky Lowrie
Support Manager

[6] On 24 October 2007 Mr Thamer emailed Ms Lowrie requesting the meeting be postponed until the following week. Ms Lowrie replied to this email and advised that ECONZ agreed to adjourn the meeting to Monday 29 October 2007.

[7] Mr Thamer attended the disciplinary meeting on Monday 29 October 2007. Present for ECONZ were Ms Lowrie, representative Mr Organ, Mr Alex Chau, and Mr Thamer.

[8] Mr Thamer provided only brief and general denials of the matters of concern to ECONZ. He did not provide any detail or give specific responses. He said he would pursue legal action against ECONZ. He said he had been bullied and harassed by ECONZ but did not provide any details. At the end of the meeting Mr Thamer said he had nothing else to add.

[9] After considering what Mr Thamer had said, Ms Lowrie advised Mr Thamer his employment was terminated immediately.

[10] The dismissal was confirmed in writing by letter dated 30 October 2007 which materially stated:-

We confirm in writing the fact that yesterday you were provided with notice of dismissal from the company. The reasons for your dismissal are as follows:-

After careful consideration of the evidence of the company concluded that you do not possess the fundamental skills and abilities to perform the requirements of your position as an Oracle Database Administrator, operating in a sole charge role. Reasons for this view have been outlined in our letter dated 23 October 2007.

○ You are unable to provide the level of support that is required by our clients.

○ You are unable to resolve production problems in a timely manner.

○ The above issues are too significant to simply be associated with you being in a new environment and unfamiliar with the database structure.

- *Your skills and knowledge are contrary to the representations and the information contained in your CV and references. Accordingly we believe that your abilities were significantly misrepresented to the company at the time of considering you for the position.*

We confirm that due process was followed with you being warned as to the possible consequences of such action as well as ample opportunity to provide an explanation. The response you provided was taken into account but failed in any way to satisfy the company's concerns.

We regret this action was necessary but confirm the company was unable to tolerate the situation continuing as it was. As advised we cannot run the risk of having an employee with serious deficiencies in knowledge and skills in the position of Oracle Database Administrator. An incorrect command by you, even if unintentional, could bring mission-critical applications down and cause significant harm to the business.

The merits

[11] The test of justification is prescribed 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.

[12] ECONZ had concerns that Mr Thamer did not appear to possess the fundamental skills and abilities to perform the requirements of his position as an Oracle Database Administrator, operating in a sole charge role.

[13] The advice of 23 October 2007 set out in full ECONZ's particular concerns about Mr Thamer. Mr Thamer was made specifically aware of his employer's concerns and he knew that his employer wished him to address those matters.

[14] At the meeting on 29 October 2007 Mr Thamer offered only a general statement in denial. He gave his employer no response to the specific concerns he was asked to address. On that basis, it was reasonable for ECONZ to form the conclusion it did about Mr Thamer's suitability for continued employment.

[15] The Authority finds that ECONZ was justified in concluding that Mr Thamer did not possess the fundamental skills and abilities to perform the requirements of his position as Oracle Database Administrator operating in a sole charge position.

[16] The Authority further finds that Mr Thamer's observed performance led ECONZ to justifiably conclude that he did not have the skills and knowledge represented in his curriculum vitae.

[17] The Authority considers that ECONZ was justified in concluding that Mr Thamer's competency was so completely and fundamentally deficient as observed by its expert employees that it was justified in concluding that the employment could not continue any longer. This was not a situation of remedying poor performance by an employee. Rather it was a fundamental misrepresentation by Mr Thamer of his skills and knowledge that rendered continued performance of the employment untenable.

The determination

[18] The Authority concludes that ECONZ's actions and how it acted were what a fair and reasonable employer would have done in the circumstances. The Authority finds that Mr Thamer was justifiably dismissed and he does not have a personal grievance. There will be no formal orders.

Costs

[19] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Organ is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Thamer is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority