

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 71/10
5151569

BETWEEN RUSSELL TIMMINS
 Applicant

AND S L TRADE LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Mark Nutsford, for Applicant
 No appearance for Respondent

Investigation Meeting: 9 February 2010

Determination: 16 February 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Timmins was employed by S L Trade Limited from March 2008 until 5 January 2009 when he was summarily dismissed. He says his dismissal was unjustified and seeks orders to compensate consequent losses.

[2] In its statement in reply S L Trade denies the claim of unjustified dismissal and raises a counterclaim for damages allegedly caused by Mr Timmins actions.

S L Trade - non-attendance

[3] S L Trade filed a statement in reply (as stated above) and attended mediation per a referral of the Authority. Without explanation it did not file witness statements as directed by the Authority. On the morning of the scheduled investigation meeting an Authority support officer telephoned the offices of S L Trade and the mobile number of one of the directors leaving messages that the scheduled investigation meeting was to proceed and inquiring as to whether the respondent would attend. These messages were not returned.

[4] Having satisfied myself that S L Trade had been duly served with the notice of investigation meeting and that reasonable attempts had been made to ascertain the respondent's whereabouts, the investigation meeting proceeded twenty minutes after the scheduled commencement time.

[5] On 11 February application was made on behalf of S L Trade to reconvene the investigation meeting. That application was declined, the reasons set out in the attached minute.

Dismissal meeting – 5 January 2009

[6] S L Trade's directors invited Mr Timmins to a meeting on the morning of 5 January. He was not told the purpose of the meeting or given an opportunity to have a representative present.

[7] Mr Timmin's recorded the meeting on his mobile telephone. A transcript of that recording has been provided to the Authority. I accept its accuracy.

[8] The directors of S L Trade told Mr Timmins he had been demoted the preceding year because they had lost trust in him. They then put two allegations to him:

- Mr Timmins had used company funds, without approval, to purchase a shredder (\$40) in order to win a barbeque, having received advice from his girlfriend (who worked at the company running the competition) that the purchase would guarantee the win – *“That you kind of rigged it so you could get it”*; and
- Mr Timmins had exceeded the reasonable use of company internet for personal email and computer gaming and this had cost the business.

[9] The directors referred to supporting material for these allegations – *“...and from what I have heard and I have pretty good sources on this...”*, *“you cost us a fortune in internet fees”*, *“we wouldn't say this if we did not have enough evidence”*, *“I have all the records about the websites you guys all visit”* - but did not put any of this material to Mr Timmins to comment on.

[10] Mr Timmins accepted he had bought the shredder but did not provide an explanation to the allegation that he had *rigged* the competition.

[11] Mr Timmins accepted he had used the company internet for personal email but said that usage was reasonable, as provided in the employment agreement. He also accepted he had used the company internet to play games. The transcript records him then saying “*But obviously, I exceeded it, I exceeded it by playing internet games and stuff.*” The “*it*” is the company policy allowing reasonable personal use of the internet. The director then says “*10GB, and last month 14GB. I don’t know how a personal emails can eat that much?*” Mr Timmins replies “*I am not saying this*”.

[12] The directors then advised Mr Timmins he was dismissed.

A justified dismissal?

[13] Section 103A of the Act sets out the test for 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.

[14] The effect of 103A is to separate the employer’s actions (including the decision to dismiss) for evaluation by the Authority against the specified objective standard of what a fair and reasonable employer would have done in the circumstances¹.

[15] Mr Timmins dismissal was unjustified. He was not given fair notice of the disciplinary meeting – he was not told what the meeting was about, what the disciplinary consequences could be or given an opportunity to have a representative present. He was not given a fair opportunity to respond to the allegations – it is fundamental to a fair investigation process that all relevant material is put to the person facing the allegations. There was no opportunity for Mr Timmins to make submissions as to possible disciplinary options. Prior to advice of dismissal there was

¹ *Air New Zealand Limited v Hudson* [2006] 1 ERNZ 415

no evidence (such as an adjournment) that S L Trade gave any consideration to the explanations Mr Timmins gave.

[16] I do not accept Mr Timmins accepted the allegations. The transcript shows Mr Timmins did not accept the excessive internet usage quoted to him and he gave no explanation for the allegation that he *rigged* a supplier's competition to win a barbeque.

Remedies

[17] Mr Timmins has established his dismissal was unjustified. He is entitled to a consideration of the remedies sought.

[18] Mr Timmins was paid \$18.50 an hour for a forty hour week. He seeks reimbursement of lost wages totalling \$2516.00 (gross) having commenced new employment three weeks and two days after his dismissal. I am satisfied Mr Timmins took reasonable steps to mitigate his lost wages following his dismissal. He is entitled to the full reimbursement of those wages.

[19] **S L Trade Limited is ordered to pay Russell Timmins \$2516.00 (gross) pursuant to section 123(b) of the Employment Relations Act 2000.**

[20] Mr Timmins seeks an award of \$10,000 for hurt and humiliation suffered consequent to his dismissal. In support of this claim he said his dismissal turned his life upside down, undermined his confidence and disrupted his relationship. I accept Mr Timmins was shocked and upset by his dismissal and the manner in which it was affected.

[21] **S L Traders Limited is ordered to pay Russell Timmins \$3000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[22] Mr Timmins also claims \$375 in unearned commission payments. This claim is made for a future lost benefit and is calculated using commissions earned during the last three months of his employment. The payment was contingent on sales being made. No sales were made. The claim is declined.

Contribution

[23] Having made an award of remedies in Mr Timmins favour I must consider what if any contribution he made to the circumstances which gave rise to his dismissal and if so whether that contribution was blameworthy².

[24] Mr Timmins' purchase of the shredder was blameworthy. The expenditure was not expressly authorised and his explanation that he repaid the money casts doubt on his explanation that the purchase was made for the benefit of the office. Notwithstanding, it is clear from the transcript that this was not a major concern for S L Trade – "*It is a small thing...*". Mr Timmins accepted he had exceeded the reasonable personal use of the work provided internet by gaming. This also was blameworthy. However, the degree of contribution is difficult to ascertain because S L Trade's failed to put to Mr Timmins the material it had about his internet use.

[25] Given the above, the remedies awarded should be reduced by 25% and I so order.

Counterclaim

[26] The counterclaim fails for want of evidence.

Costs

[27] Mr Nutsford submits an award of costs on a tariff base should be made. I do not know what Mr Timmins actual costs were. An assessment of actual and reasonable costs must be made before an exercise of the Authority's costs discretion. Costs might be a matter the parties can resolve themselves. If not, application should be made within 14 days of the date of determination for a costs timetable to be set.

Marija Urlich

Member of the Employment Relations Authority

² Section 124 Employment Relations Act 2000

