

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 513  
5393952

BETWEEN                      CHRISTOPHER IAN  
                                         TRISCOTT  
                                         Applicant

A N D                              CALLPLUS SERVICES  
                                         LIMITED  
                                         Respondent

Member of Authority:      K J Anderson

Representatives:            S Barter, Counsel for Applicant  
                                         B Edwards, Counsel for Respondent

Investigation Meeting:      18 June 2013 at Auckland

Submissions Received:      10 July 2013 from Respondent  
                                         19 July 2013 from Applicant

Date of Determination:      13 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Mr Triscott, claims that he was unjustifiably dismissed on 26 April 2012. Mr Triscott asks the Authority to find that he has a personal grievance and award him various remedies. Mr Triscott also claims that he is entitled to be paid commissions due to him for business completed prior to his dismissal in the sum of approximately \$1,392.68. For completeness only, I record that a claim for unpaid fuel costs has been resolved by the parties.

[2]     The respondent, CallPlus Services Limited (CallPlus), rebuts the claim of unjustifiable dismissal and says that the employment of Mr Triscott was justifiably

terminated because he had abandoned his employment. The response to Mr Triscott's claim for commission payments is recorded later in this determination.

### **Background**

[3] Mr Triscott commenced his employment with CallPlus in August 2007 as a sales representative. In May 2009, he was promoted to the position of Channel Manager, being paid a base salary and commission.

[4] While the dismissal of Mr Triscott was not, ostensibly, for performance related matters, it appears to be his view that the termination of his employment was, at least partially, related to issues that arose pertaining to his performance. Therefore the evidence about this requires some examination by the Authority.

### **Performance management**

[5] The evidence of Mr Kelvin Hussey, the General Manager of CallPlus Business Solutions, and to who Mr Triscott reported directly, is that in 2011, concerns arose regarding Mr Triscott's sales performance. These concerns led to Mr Hussey commencing a performance management process with Mr Triscott. Mr Hussey attests that he had serious concerns about the inability of Mr Triscott to reach targets and there was a concern about Mr Triscott's neglect of channel relationships. According to Mr Hussey, there were also inconsistent results and an inability to bring in customers and associated revenue.

[6] It is commonly accepted that some time early in 2012, Mr Hussey raised some issues about the performance of Mr Triscott in a one-to-one meeting between the two men. The outcome of their discussion appears to be recorded in an email dated 17 February 2012 from Mr Hussey to Mr Triscott; the pertinent content being reference to a sales performance target for the remainder of the financial year. Mr Hussey informs that:

Chris this is a personal target and failure to achieve a satisfactory performance could result in performance management.

[7] On 8 March 2012, a meeting took place between Mr Hussey and Mr Triscott. There is some conflict in the evidence of the two men as to what was discussed but it seems to be commonly accepted that at the conclusion of the meeting, Mr Hussey gave Mr Triscott a letter dated 5 March 2012. Just quite why the letter is predated has

not been explained but no issue has been taken with that. The letter is headed **FINAL PERFORMANCE LEVEL WARNING**. It records that there had been discussions about concerns relating to Mr Triscott's sales performance. The germane content of the letter is:

If you do not achieve your target for March we will need to review your position and we may decide to terminate your employment as a Channel Manager with one month's notice.

[8] On a more positive note, the letter records:

We very much appreciate the hard work and energy you contribute to CallPlus and we still want you to succeed in this role so if we can do anything to help Chris, you need to let me know. If you have any questions please let me know.

[9] Via an email dated 9 March 2012, Mr Triscott responded to Mr Hussey's performance level warning letter of 5 March 2012. Mr Triscott provided a number of explanations and concluded his letter by indicating that he continued "...to be driven towards our success".

[10] The evidence of Mr Triscott is that he overheard a discussion between Mr Hussey and a recruitment agency whereby Mr Hussey had mentioned "a channel manager position". In an email dated 12 March 2012, Mr Triscott made mention of this to Mr Hussey. The inference being that Mr Triscott suspected that he was going to be replaced.

### **Meeting – 15 March 2012**

[11] Mr Triscott and Mr Hussey met at a café on 15 March 2012. While there is some difference in the evidence of the two men about what was discussed, it appears to be commonly accepted that the purpose of the meeting was to discuss a potential sales role for Mr Triscott as it was apparent that CallPlus was not satisfied with Mr Triscott's performance in the role of Channel Manager.

[12] The evidence of Mr Triscott is that he was offered a position as a "junior" sales representative working for Mr Craig Skinner, the CallPlus National Sales Manager. Mr Triscott attests that if he accepted the sales role he would have had to "start from scratch" and that if he met a sales target of \$200,000 per month for three to six months, he could be considered for the senior sales team. Mr Triscott says that the sales role offered to him on 15 March 2012 was "completely different" from an

offer that had been made to him by Mr Hussey on 8 March 2012. Mr Triscott says that the earlier offer or proposal involved a senior sales representative position with appropriate remuneration.

[13] The evidence of Mr Hussey about the role proposed for Mr Triscott is quite brief. Mr Hussey says that at the end of the meeting, Mr Triscott agreed to meet with Mr Skinner the following day (16 March 2012). Mr Hussey attests that he had always thought of Mr Triscott as a good employee, being energetic and committed to CallPlus. Mr Hussey says that if the Channel Manager position was not successful for Mr Triscott, rather than lose him from the business, the intention was to keep him employed within CallPlus.

#### **16 March 2012 - Mr Triscott's absence from work**

[14] While it was agreed that Mr Triscott would meet with Mr Skinner on Friday, 16 March 2012 to discuss the sales position, this did not occur as Mr Triscott did not attend work that day and he did not notify of his absence.

[15] However, on the morning of Monday, 19 March 2012 (9:35a.m.), Mr Triscott sent an email to Mr Mark O'Connell, the Human Resources Director for CallPlus. Mr Triscott notified that his partner was in intensive care at Auckland Hospital. Mr O'Connell was asked to:

Let Kelvin [Mr Hussey] know I won't be returning to work.

[16] The content of the email informed further that:

Obviously now I won't hit his requested number for the month resulting in termination letter. I have no interest in accepting the jnr sales role he discussed and in fact any role at CallPlus due to the way I have been treated and removed from my role. You will be hearing from me in due course. I only want to communicate with you Mark.

[17] Mr O'Connell replied to Mr Triscott by return email that morning, expressing his concern about the circumstances pertaining to Mr Triscott's partner. Mr O'Connell also conveyed:

... and understand your concern about your role. Can you ring me today when you get the chance. How about we meet for a coffee to discuss? Maybe offsite down the café on Kohi?

[18] Mr O'Connell attests that he assumed from Mr Triscott's email that he was abandoning his employment with CallPlus but he wanted to "ensure that this was the

case” and he felt obligated to follow up with Mr Triscott. But, he did not receive a response from Mr Triscott and therefore sent another email to him the next morning (20 March 2012):

Hi Chris, just to follow up yesterday. It is really important that we speak today now.

[19] Later the same morning, Mr O’Connell sent a text message to Mr Triscott informing of the two emails he had recently sent and indicating that it was “really important” to talk that day. Mr O’Connell asked Mr Triscott to ring him as soon as he got a chance to do so. There was no response from Mr Triscott.

[20] Mr O’Connell sent a further text message to Mr Triscott on Wednesday, 21 March 2012 asking him to call him “ASAP”. Again, there was no response from Mr Triscott.

[21] Mr Triscott did not make contact with his employer until Friday, 23 March 2012 (12:24p.m.), when he sent an email to Mr O’Connell. The email was (apparently) sent from the email address of Mr Triscott’s partner via her i-Phone. Mr Triscott informed that his partner was now out of critical care and that he was now able to start “thinking about other things and to deal with the world again”. Mr Triscott also informed that:

I will be back on deck shortly and would be grateful for compassionate leave until the end of Easter when I will have a better idea of what the medium term holds. The last few days have been pretty severe as you can imagine. I have had to use [partner’s] iPhone to send emails as my work phone seems to have a server connect issue, preventing me from emailing. Please reply to this email address.

[22] Mr Triscott also conveyed that he had noted that his work phone had “a server connect issue” and there appeared to have been an incomplete payment of his salary. He asked Mr O’Connell if he could find out what had happened in regard to the salary and advise. Mr Triscott concluded his email indicating that he would be remaining at the hospital for the rest of the day and that he would respond to Mr O’Connell as soon as he could “over the next 24 hours”.

[23] Mr O’Connell responded by return email (1:28p.m.) on the same day. He informed Mr Triscott that he was not going to be available as he was on leave that day but he could be reached either over the weekend or on Monday. Mr O’Connell also

informed that he did not know that Mr Triscott's partner was critically injured on Saturday. And further:

All you said was she's in hospital and you weren't intending to come back to work. I asked you 4 times to contact me. The 3 were urgent requests. So yes, please call me and we can meet up next week, so I can understand what's happened. As I said in my initial email happy to meet up for coffee offsite away from the office. Maybe on Monday?

[24] At 5:02p.m. on 23 March 2012, Mr Triscott emailed Mr O'Connell:

Will aim for Monday, will let you know Monday am. Maybe on grafton Ed, across from the hospital. I did inform both Kelvin and yourself that she [his partner] was in intensive care. She was critical for 2 days. I wrote you the email Monday am after being in intensive care for 48 hours straight. I just noticed that I had not written "for the rest of the week" when advising of my absence. I was in a daze. I had just been informed that [partner] was going to be in hospital for up to 4 weeks. Anyway, talk Monday.

[25] There was no further contact from Mr Triscott until he sent a text message to Mr O'Connell on Tuesday, 27 March 2012 (1:39p.m.). Mr Triscott informed that he had been "dealing with the Psych team" at Auckland hospital for the past three days. Mr Triscott informed that:

My focus has been on this serious issue all week.

[26] The text message concluded by Mr Triscott informing that:

I'll be in touch re meeting you later this week.

[27] Mr O'Connell's response was to send a text message to Mr Triscott at 4:43p.m. that day:

Hi Chris it is very hard for me to understand what is going on. Your brief email last week was you were abandoning your role. I have demanded several times that you need to ring me urgently to discuss what has happened. You absolutely must call us as your employer. We have no idea what you are doing with your role and responsibilities. Text or email messages is not good enough. I understand you have some sort of serious issue with your partner but you are not being fair on us. Plse ring me asap and no later than 10am tomorrow at the latest.

Mr O'Connell included a number for Mr Triscott to contact him on.

[28] Mr Triscott made a telephone call to Mr O'Connell the next day (28 March 2012). It was agreed that Mr Triscott would meet with Mr Hussey the following day

(29 March 2012). Mr O'Connell attests that during the telephone conversation with Mr Triscott, he "specifically stressed" that Mr Triscott must stay in contact with CallPlus, that he had a responsibility to keep CallPlus informed of what was going on and where he was, and finally, it was not fair to leave Mr Hussey and CallPlus "in the dark". Mr O'Connell says that Mr Triscott agreed about this.

### **Meeting between Mr Triscott and Mr Hussey – 29 March 2012**

[29] The evidence of Mr Hussey is that during this meeting with Mr Triscott the following matters were discussed:

- (a) Mr Triscott's performance expectations, in particular the target he was required to achieve for March 2012;
- (b) Mr Triscott not attending work on 16 March 2012 without explanation;
- (c) The need for Mr Triscott to communicate with CallPlus in an open way and to take responsibility for his employment, including as an example, Mr Triscott's 23 March 2012 email to Mr O'Connell;
- (d) The potential sales role; and
- (e) The circumstances pertaining to Mr Triscott's partner and her medical assessment.

[30] By an email to Mr Triscott dated 30 March 2012, Mr Hussey recorded an outline of the discussion between the two men the previous day. Mr Triscott was informed that now Mr Hussey had a better understanding of what had happened to Mr Triscott's partner and what Mr Triscott had experienced, he would be paid sick leave from 19 March 2012 until Friday, 6 April 2012 (Good Friday). Mr Hussey informed that:

As we discussed, despite this difficult time, you have some decisions to make with respect to your employment with us. The options we discussed are outlined below:

1. Return to work as a BDM in the direct sales team, reporting to Craig. Should you want to adopt this option you will retain your existing base salary and earn the normal BDM commissions. We will give you paid sick leave until Thursday, 5 April (Easter holiday). Then take annual leave, returning to work Monday 23 April. This should give you the time to get through the immediate issues and time to rest up

and begin to recover. I genuinely believe that this is the best option for you and the business.

2. If you feel you can't continue with CallPlus, I am open to agreeing to your resigning where we would pay you a notice period and your annual leave outstanding. I would act as a referee for you and ensure you a positive reference.
3. If you are intent on continuing as Channels Manager, we would need to consider this, given the current performance management process. I am not sure what the outcome of that may be, but one of the options there, is terminating the Channels Manager role if it is not viable for the business. This would involve a formal meeting to review your performance in the role.

As a business we need to understand where we stand urgently. **You need to let me know which option you want to take by Thursday 5 April midday.**

[31] In response to Mr Hussey requiring a response from him by 5 April 2012, Mr Triscott sent an email that day. He informed Mr Hussey that he did not accept that his current role of Channel Manager could be disestablished. In summary, Mr Triscott informed that:

I also have significant issues over your email of the 30th March both as to its accuracy and the basis of views taken by the company about me and my role. I will be back as set out in your letter hopefully on April 22nd. If my state of mind improves I will let you know and be back earlier. I do not accept your unilateral attempt to vary my position and expect to continue as Channel Manager when I return.

### **Provision of medical certificates**

[32] On 11 April 2012, Mr O'Connell sent an email to Mr Triscott requesting that he provide a doctor's certificate that would indicate when Mr Triscott would be fit for work. Mr O'Connell also asked Mr Triscott to confirm the date that he would return to work. This information was to be provided by Friday, 13 April 2012.

[33] The evidence of Mr Triscott is that, because he was unable to access a scanner to copy his doctor's certificate to send by text to Mr O'Connell by 4:00p.m. on 13 April 2012, it was subsequently agreed between the two men that day that the certificate could be provided on Monday, 16 April 2012 and this duly occurred. In fact, Mr Triscott provided two medical certificates by photographing them with his cellphone and forwarding them to Mr O'Connell via a text message. Mr O'Connell confirmed receipt of these later on 16 April 2012 via a text message to Mr Triscott. However, Mr O'Connell indicated that one of the certificates was legible but the other

was not. Mr O'Connell assumed that both of the certificates were the same but it duly transpired that they were not. The legible document informed that Mr Triscott was "unfit to resume work for a period of up to 21 days from 28 March 2012". The second certificate, which was illegible due to the process of photographing it with the cellphone, indicated that Mr Triscott was unfit to resume work for a period of up to 21 days from 16 April 2012, leaving Mr Triscott, apparently, fit to resume work from on or about 7 May 2012. However, it has to be accepted that at this point, Mr O'Connell was unaware of the content of the second certificate until some time much later. Just when is inconclusive.

[34] On 17 April 2012, Mr O'Connell attempted to contact Mr Triscott on his mobile phone but could only leave a voicemail message. He asked Mr Triscott to contact him. Later the same day, Mr O'Connell made another attempt to contact Mr Triscott via the mobile phone of Mr Triscott's partner. Again, Mr O'Connell could only leave a message for Mr Triscott to contact him. And then on the evening of 17 April (6:00p.m.), Mr O'Connell sent an email to the email address of Mr Triscott's partner<sup>1</sup>. In this email, (summarised) Mr O'Connell:

- (a) Confirmed that Mr Triscott was on paid sick leave until Monday, 23 April 2012;
- (b) Sought urgent clarification of the medical certificates attached to his text message on 16 April 2012 (as one was illegible);
- (c) Relayed his concerns about Mr Triscott's unexplained absence and failure to communicate;
- (d) Informed Mr Triscott that his conduct regarding communicating with CallPlus raised questions about his intention to continue with the employment relationship;
- (e) Sought a meeting on 23 April 2012 to discuss his concerns about his lack of communication and his earlier advice that he was not returning to work; and

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<sup>1</sup> As this was the email address Mr Triscott had been sending emails from.

- (f) Informed Mr Triscott that the outcome of the meeting may have an impact on his employment and involve termination, hence he was welcome to bring along a representative.

[35] Mr O'Connell received a response from Mr Triscott's partner late on 17 April 2012. She informed that Mr Triscott was no longer available on the email address used by Mr O'Connell but she would be seeing Mr Triscott on 19 April and would pass Mr O'Connell's message to him.

[36] Mr O'Connell sent a further email to Mr Triscott's partner requesting a telephone number that Mr Triscott could be contacted on. No response was received to this email. On 18 April 2012, Mr O'Connell sent a text message to Mr Triscott asking him to ring him "asap". There was no response.

[37] On Monday, 23 April 2012, Mr O'Connell twice attempted to contact Mr Triscott. First, at 8:30a.m. by calling Mr Triscott's mobile phone, with no reply, and secondly, via a text message at 8:39a.m, asking Mr Triscott if he was going to meet with him at 9.30am that day. There was no response, hence at 9:48a.m, Mr O'Connell sent another email to Mr Triscott's partner asking that Mr Triscott make contact "urgently ASAP". Mr O'Connell also informed that:

It is now urgent to his employment that he contact us immediately and absolutely before 5pm today – Monday.

We are now seriously wondering if he has abandoned us. I am happy to help him as much as I possibly can, but I can't do anything if he doesn't talk to me.

[38] Mr O'Connell also attempted to contact Mr Triscott via a text message:

Hi Chris, if you don't call me by 5pm today, I'm going to assume you have abandoned us and terminate your employment. I'm not angry, I want to help you if you want help.

[39] Later that morning (11:58, 23 April 2012), Mr O'Connell received an email from Mr Triscott's partner informing that:

Chris is up north, I will talk to him later today.

[40] On 24 April 2012, Mr O'Connell called Mr Triscott's mobile phone and left a message advising that after repeated attempts to contact him, Mr Triscott had still not contacted CallPlus; and Mr O'Connell informed that he did not know what else could

be done. Mr O'Connell informed Mr Triscott that there was no other option but to consider that he had "abandoned us".

[41] Mr O'Connell followed up his voicemail message with a text message:

Hi Chris, we still haven't heard anything from you so we now assume you had abandoned your employment. This is a very disappointing situation not to have at least discussed it with you. We will process your final pay in the next pay and I will send a message to your home address as well in Arkles Bay. Would still like to talk to you so pls call me.

#### **A response from Mr Triscott**

[42] Mr Triscott sent an email at 10:51a.m. on 24 April 2012, an apparent response to Mr O'Connell's last text message. Mr Triscott informed:

I am finally able to get on line today. I got to read your last text this morning regarding termination of employment. Could you please put this in writing and send to this email address today. I assume that my holiday pay owing will be paid out in full along with \$1600 in commission owed from sales I had actually signed off for March prior to 17th March. Could you please advise when this will be going into my account via this email address.

[43] Mr O'Connell attests (and it is accepted) that he was unaware of this email until noticing that Mr Triscott had referred to it in his brief of evidence for the Authority's investigation meeting. Mr O'Connell then searched his email inbox and found the email in the deleted items mailbox. He says that the address of the email sender: "ifcfanatic@slingshot.co.nz" does not indicate that this was an email from Mr Triscott. Mr O'Connell attests that because he receives emails from a lot of unknown parties that are usually spam or unsolicited marketing emails, many are deleted without being opened and this is what happened to Mr Triscott's email. Nonetheless, Mr O'Connell voluntarily conceded that the email title: "Termination of Employment" should have raised his attention.

[44] Mr O'Connell also attests that he had anticipated that if Mr Triscott did not want to abandon his employment, he would have made a phone call to him to explain his situation and intentions. Mr O'Connell notes that Mr Triscott's email of 24 April 2012 does not take any issue with the view expressed by Mr O'Connell (via the text message) that Mr Triscott had abandoned his employment. Rather, the email indicates an acceptance of the situation and seeks confirmation of final pay details.

[45] Notwithstanding Mr Triscott's email of 24 April 2012, a matter I will return to in due course, as at 27 April 2012, Mr O'Connell had not had any contact from Mr Triscott and hence on this day he sent a termination letter to the email address of Mr Triscott's partner and also to two other addresses that the company had on file for Mr Triscott. This letter informs that:

PRIVATE & CONFIDENTIAL

Dear Chris,

As you have stopped responding to us and have not come in to work, nor contacted us, we have deemed that you have now abandoned your employment so the agreement has terminated. We tried contacting you constantly on several numbers and emails over the last two weeks with no reply.

I am disappointed it has ended in this way as we have a great deal of respect for you. I have left messages with your partner, your ex-partner and your parents (as I understand) to contact me. The business has to continue to operate so we have no alternative but to take this step.

You are still in possession of a company mobile handset and a laptop as well as the office security access card. The total value of these items amounts to approximately \$1,400 so we need to deduct this from your final pay. Your final pay will go in the next standard pay run. If you return these items to me directly, I am happy to reverse the money back to you.

We would still like you to contact us to understand what has happened and why.

### **The raising of a personal grievance**

[46] Mr Triscott engaged a lawyer and via a letter dated 2 May 2012 to CallPlus, it was conveyed that Mr Triscott had not abandoned his employment and that the company was aware of his "traumatic circumstances" and the provision of medical certificates. CallPlus was informed that Mr Triscott had been advised by his medical practitioner to remove himself from all outside influences and to take a short course of drugs to deal with his depression. It was alleged that CallPlus had been looking for a basis to dismiss Mr Triscott. The letter concludes that Mr Triscott had been dismissed by text message and that he had not received any letter informing of the termination of his employment. However, Mr Triscott's evidence to the Authority is at odds with this assertion, whereby he attests that:

On 26 April 2012 I received a letter from the respondent confirming termination of my employment.

[47] But even this cannot be right as Mr O'Connor did not post the letter until 27 April 2012. Finally, the letter sought that Mr Triscott be reinstated forthwith. CallPlus responded promptly by a letter from the company's lawyer dated 9 May 2012 rebutting Mr Triscott's alleged personal grievance and the remedy of reinstatement.

### **Analysis and conclusions**

[48] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test<sup>2</sup>:

... whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[49] In this case, one of "the circumstances" involved is that the employment agreement contains an abandonment of employment provision and CallPlus says that it was entitled to action this and hence the termination of Mr Triscott's employment was justifiable, given all the circumstances.

[50] Clause 5.13 of the employment agreement provides:

In the event that you are absent from work for three consecutive working days without any notification to your direct supervisor, and if we have made reasonable efforts to contact you, we may consider you to have abandoned your employment. This agreement may be terminated then without the need for notice to terminate your employment.

[51] The first question that arises is:

### **Was Mr Triscott absent from work for three consecutive working days without notification to his direct supervisor?**

Given that Mr O'Connell was managing the communications with Mr Triscott, it can be taken that he fulfilled the role of "direct supervisor". A significant factor is the provision of the two medical certificates by Mr Triscott. It is mutually accepted that the legible certificate was notification that Mr Triscott would be absent on medical grounds for a period "up to" 21 days from 28 March 2012. Therefore, including 28 March as one of the days, Mr Triscott could have been expected to be back at work on 19 April. Then there is the email that Mr Triscott sent to Mr Hussey on 5 April 2012

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<sup>2</sup> Section 103A(2) of the Employment Relations Act 2000 (the ERA)

whereby Mr Triscott informed that “hopefully” he would return to work on 22 April 2012; notwithstanding that this was a Sunday, hence perhaps it could be assumed that Mr Triscott was envisaging returning to work on Monday, 23 April. And of course Mr Hussey had confirmed, on 30 March 2012, that Mr Triscott was not expected to return to work until 24 April 2012 as he would be paid sick leave up to 23 April 2012.

[52] But then, this appears to have possibly been overcome by events whereby Mr Triscott forwarded a medical certificate on 16 April 2012 that we have already canvassed. Mr Triscott says that at the same time (16 April 2012), he forwarded an additional certificate that would have allowed him to be off work until 7 May 2012. It is established that this certificate was illegible and Mr Triscott was informed of this by Mr O’Connell later on 16 April 2012. Mr Triscott says that the second certificate was clear on his phone after he photographed but this has been proven not to be so.

[53] Mr Triscott acknowledges receiving a text message from Mr O’Connell informing him of the illegibility of the second certificate. But he did not take any action to make another copy and forward it to Mr O’Connell. Neither did he make any attempt at all to clarify the situation for Mr O’Connell; for example, by a phone call or text. Further, given that the existence of the second certificate would have given credence to Mr Triscott’s position that he was medically unfit to return to work, one would have expected that he would have taken the trouble to forward a legible copy of the certificate to CallPlus.

[54] And then there is Mr O’Connell’s email to Mr Triscott sent at 6:00p.m. on 17 April 2012. This records, among other things, that:

Hi Chris, I received your text on Monday morning with 2 documents attached – one was a Dr cert saying you were unfit to work from 28 March to Thursday 19 April. The other was completely illegible but looked like the same document as the first? **Please clarify this with me urgently.**

In any case you are required to stay home until Monday 23rd April.  
We will pay you up to Monday 23rd April.

[55] Mr O’Connell’s email then informs that Mr Triscott was required to come into CallPlus and meet to discuss a couple of aspects that were “serious”. The content of the email then informs that:

The outcome of this meeting may have an impact on your employment and could involve termination so you are welcome to

bring a representative or support person with you. I am keen to support you to gain the best possible outcome in respect of what has happened. I will set the meeting for Monday 23rd April 9am and it will be with myself with Kelvin attending. I'd like you to confirm you will attend this meeting as a courtesy. The meeting will be in the Jackson Room on level 9 at 9am. If you are unable to attend this meeting you will need to speak to me in person. If you have any questions please let me know.

[56] Mr Triscott's partner responded to this email and informed that she would be seeing him on 19 April 2012 and would pass Mr O'Connell's email on. However, it seems that this may not have happened as the evidence of Mr Triscott is that, on the evening of 17 April 2012, he drove to Omaha to stay at a friend's house and Mr Triscott's partner confirmed in an email to Mr O'Connell on 23 April 2012, that Mr Triscott was "up north" but she would talk to him later that day. Nonetheless, Mr Triscott's evidence that his partner did not receive Mr O'Connell's email of 17 April until the evening of 22 April 2012, cannot be right, given the evidence of her response on the evening of 17 April 2012 (7:17p.m.).

[57] But on the weight of the overall evidence, the Authority concludes that it is more probable than not that Mr Triscott was unaware that he was expected to attend the meeting on 23 April 2012. Nonetheless, that does not alter the fact that his employer was expecting him to be back at work on 24 April 2012.

### **The activation of the abandonment clause**

[58] In regard to the abandonment of employment clause and the activating of it by CallPlus, some problems arise. First, notwithstanding that Mr Triscott did not attend the meeting on 23 April because he was, most probably, unaware of it, CallPlus had confirmed that he would be paid sick leave up to and including that day. Therefore, the first day of absence, pertaining to the three consecutive working days without notification, would have been Tuesday, 24 April 2012 with the third consecutive day being Thursday, 26 April 2012. However, as evidenced by an email from Mr Hussey to Mr O'Connell, at 12:01p.m. on Monday, 23 April 2012, clearly Mr Hussey was of the view that Mr Triscott had abandoned his employment. And as at 11:48a.m. on 24 April 2012, as evidenced by a text message to Mr Triscott, Mr O'Connell had concluded that Mr Triscott had abandoned his employment and informed him that:

... we still haven't heard anything from you so we now assume you had abandoned your employment.

[59] Mr Triscott was also informed that he would be paid his final pay. The evidence of Mr O'Connell is that on Thursday, 26 April 2012 he drafted the letter that confirmed the termination of Mr Triscott's employment and this was posted on 27 April 2012.

[60] But then, as evidenced by Mr Triscott's email to Mr O'Connell at 10:50a.m. on 24 April 2012, Mr Triscott accepted that his employment had been terminated and asked for all monies due to be paid to him. Nonetheless, notwithstanding Mr Triscott's apparent acceptance of the situation (then), I find that CallPlus was not entitled to terminate the employment of Mr Triscott when it did as he had not been absent from work for three consecutive days without notification as of 24 April 2012. Therefore, CallPlus breached the abandonment of employment term of Mr Triscott's employment agreement and applying the test in s.103A(2) of the ERA, I find that a reasonable employer could not terminate the employment of Mr Triscott when the termination was a breach of his employment agreement. It follows that the dismissal of Mr Triscott was unjustified.

### **Remedies**

[61] Having found that the dismissal of Mr Triscott was unjustified, and hence he has a personal grievance, pursuant to sections 123 and 128 of the ERA, the Authority may, in settling the grievance, provide for various remedies, including reimbursement of lost wages and compensation for distress.

#### *Reimbursement of lost wages*

[62] Mr Triscott seeks an award of wages for the period 30 April 2012 to 18 June 2013,<sup>3</sup> that is, nearly 14 months. Section 128 of the ERA provides that given the employee has a personal grievance and remuneration has been lost, then subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Then at section 128(3), the Authority has discretion to award lost remuneration for a period greater than 3 months.

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<sup>3</sup> The date of the investigation meeting.

[63] The Authority also has an obligation pursuant to section 124 of the ERA to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. And I am cognisant of the finding of Chief Judge Goddard in *Davis Trading Company Limited v Lewis*:<sup>4</sup>

But once contributory fault is established, there seems no warrant for exercising in the respondent's [employee's] favour the discretion to award more than the minimum loss and even that requires to be reduced ....

[64] In *Davis*, Chief Judge Goddard also stated that:

... the deduction should be of such an amount as is equitable having regard to the rights and obligations of the wronged person and the wrongdoer towards each other. The [employee] had the right not to be unjustifiably dismissed but he also had an obligation not to damage the relationship of trust and confidence to such an extent as to induce his employer to destroy it.

[65] Taking all of the circumstances into account and subject to the consideration of a reduction in remedies that will follow, I would have awarded Mr Triscott reimbursement of 3 months' wages.

#### *Compensation*

[66] Mr Triscott seeks an award of \$30,000 pursuant to section 123(1)(c)(i) of the ERA. This sum is manifestly excessive when compared with the usual awards made by the Authority (and the Employment Court), except in rare and exceptional circumstances. Mr Triscott has given some evidence of the affect of his dismissal including his embarrassment at having to inform his parents of the loss of his employment and receiving counselling relating to the loss of his employment. However, he also gave evidence relating to the affect on him of the accident involving his partner at the time and it is necessary to attempt to separate out which had the most affect on him. I conclude that it was the latter and the employer cannot be held responsible for Mr Triscott's state of mind associated with the accident. Therefore, subject to the following reduction in remedies, I would have awarded compensation in the sum of \$6,000.

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<sup>4</sup> [1993] 2 ERNZ 272 at 288.

*Reduction of remedies*

[67] In applying section 124 of the ERA I am also cognisant of the good faith provisions of s.4 of the Act, particularly s.4(1A)(b) which, referring to the duty of good faith:

... requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...

[68] I find that Mr Triscott failed to be “responsive and communicative” towards his employer during his absence from his employment that began on 16 March 2012. And while it must be accepted that there were serious issues relating to the wellbeing of his partner for him to cope with, this does not excuse his general failure to communicate with his employer (unless actively prompted), in regard to his circumstances and intentions, as he had plenty of opportunity to do so. I regret to say that I did not find his explanations pertaining to his lack of contact to be persuasive. I find that Mr Triscott was in breach of his duty of good faith pursuant to s.4(1A)(b) of the ERA to such an extent that the remedies that may have been awarded to settle his grievance should be reduced in recognition of Mr Triscott’s overall actions and dismissive behaviour towards his employer.

[69] Additionally, there is the matter of the illegible medical certificate. Mr Triscott knew that CallPlus required him to clarify the situation but he showed no inclination to do so albeit it would have been a simple step to take. Indeed, as mentioned earlier, had Mr Triscott forwarded a legible copy of this certificate it would have been difficult for CallPlus to conclude that Mr Triscott was absent without good reason.

[70] In further assessing an appropriate reduction in the remedies to be awarded, I have also taken into account Mr Triscott’s response to the Authority when he was asked about why he did not explain any misunderstanding as to why he had not contacted his employer, despite Mr O’Connell clearly indicating he would help if he could. Mr Triscott told the Authority:

I had had enough, why would I want to go back? Why would you have the commitment to go back? I don’t know anyone who would go back.

[71] And then there is the earlier email communication (19 March 2012) from Mr Triscott to Mr O’Connell. Mr Triscott asked Mr O’Connell to: “... let Kelvin [Mr Hussey] know I won’t be returning to work”. In a subsequent email (23 March 2012) Mr Triscott suggests that he omitted to add the words: “for the rest of the week” but this seems to be a disingenuous afterthought by him, particularly given that in the 19 March email he also informs that:

“I have no interest in accepting the jnr sales role he [Mr Hussey] discussed and in fact any role at CallPlus due to the way I have been treated and removed from my role”.<sup>5</sup>

Taking into account Mr Triscott’s words and actions, and even allowing for his state of mind relative to his partner’s accident, I conclude that it is quite probable that at some point, even before CallPlus decided to terminate his employment, Mr Triscott had decided that he was not going to go back to work for the Company, notwithstanding some indications to the contrary. Because of Mr Triscott’s overall blameworthy conduct, I conclude that the remedies that he would have been awarded are nullified to such a substantial degree that no order is made.

### **The commission payments**

[72] In a supplementary witness statement, Mr Triscott attests that under the terms of his employment agreement he was entitled to be paid commission on the basis of 1% of the total contract value of sales signed. Mr Triscott submits that the value of the sales signed by him as of 20 March 2012 was \$139,268. Mr Triscott has not seen fit to present any calculations but a simple maths application shows that 1% of \$139,268 is \$1,392.68. The copy of the employment agreement before the Authority (at clause 3.2) provides that the commission structure entitles Mr Triscott to \$48,000 per annum (gross) for reaching target sales revenue. But this was 2007 and perhaps there has been some change that the Authority has not been informed of.

[73] In any event, the closing submissions for CallPlus acknowledge that Mr Triscott is entitled to a commission payment of \$1,190.38 and this amount was to be paid to Mr Triscott immediately upon arrangement with his representative. The Authority has not been notified if this has been acceptable to Mr Triscott. There is a difference of \$202.30 compared with what Mr Triscott says is due to him.

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<sup>5</sup> Mr Triscott had not been removed from his role as Channel Manager albeit there were discussions of some importance related to his performance and future options.

But given that there is not sufficient clarity available to account for that difference, the entitlement remains inconclusive.

### **Determination**

[74] For the reasons set out above, the Authority finds that Mr Triscott was unjustifiably dismissed. He has a personal grievance but pursuant to section 124 of the ERA, and for the reasons set out above, he is not entitled to any remedies.

### **Costs**

[75] Costs are reserved. The respondent has largely been successful in defending the claims of Mr Triscott. The parties are invited to resolve the matter of costs relative to the overall outcome. In the event that a resolution is not reached, the respondent has 28 days from the date of this determination to file and serve costs submissions. The applicant has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**