

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 118/09
5150200

BETWEEN GEOFFREY ALLOTT
 Applicant

AND SUPER VALUE CARS
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Robert Thompson, Advocate for Applicant
 Michael Mackay, for Respondent

Investigation Meeting: 10 July 2009 at Christchurch

Determination: 30 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Allott) claims to have been unjustifiably dismissed by the respondent (Super Value Cars) and also to have suffered disadvantage as a consequence of unjustified action or actions of Super Value Cars. Super Value Cars resist these claims.

[2] Mr Allott was employed by Super Value Cars to assist in a variety of tasks. Mr Mackay (who gave evidence on behalf of Super Value Cars), was its managing director. He agrees that he approached Mr Allott to work for Super Value Cars, having had Mr Allott work for him in a previous business. Mr Mackay says that he wanted Mr Allott as a handyman/groomer doing things like getting warrants of fitness for cars and doing small repair jobs and grooming cars for sale. Selling cars was to be very much a back up role to Mr Mackay who was the main salesman. Mr Mackay says that when Mr Allott was employed, he had shoulder length hair and a full beard and tended to wear his shirt unbuttoned disclosing an ample collection of chest hair. This made him less suitable for a selling role.

[3] Mr Mackay says that what happened in practice was that he (Mr Mackay) ended up doing more of the odd jobs because Mr Allott *fancied himself* as a salesperson. Mr Mackay says that that did not suit him as he (Mr Mackay) was a better salesman than Mr Allott was.

[4] Mr Mackay says that he wrote Mr Allott a number of memos over the period of the employment to try to get Mr Allott to either:

- (a) Focus on the work that he was engaged for; or
- (b) Sell more vehicles;

but that in the result there was no real improvement in the position.

[5] Accordingly, on 19 May 2008, Mr Mackay arranged to meet with Mr Allott to discuss the future. Mr Mackay says there was a lengthy discussion which culminated in him giving Mr Allott two weeks' notice of the termination of his employment.

[6] Then, because Mr Mackay was concerned that Mr Allott was so upset about the possibility of losing his position, Mr Mackay proposed to Mr Allott that the latter accept a commission only remuneration package but this was not acceptable to Mr Allott. Finally, by letter dated 4 June 2008, Mr Mackay reaffirmed the earlier decision of Super Value Cars to terminate Mr Allott's employment and on 14 June 2008, Mr Allott arrived at the workplace, cleared out his desk and left.

[7] A personal grievance was subsequently raised.

Issues

[8] The first issue the Authority must determine is whether Mr Allott suffered disadvantage as a consequence of unjustifiable actions of the employer. The second is whether Super Value Cars unjustifiably dismissed Mr Allott.

The disadvantage grievance

[9] Mr Allott claims to have been disadvantaged by unjustified actions of Super Value Cars. This claim relates to the allegedly unsatisfactory way in which wages were paid by Super Value Cars.

[10] The first issue relied upon is the failure of Super Value Cars to pay wages on time on every occasion they were due. There is dispute about how often there was delay in the payment of wages with Super Value Cars acknowledging that on three occasions during the employment there was a delay caused by the dishonour of a cheque and Mr Allott claiming that this happened more frequently. Whatever the number, it is common ground that there were cheques dishonoured for insufficient funds and this impacted on Mr Allott. What is relevant, though, is the extent to which such a phenomenon is culpable in the present economic environment. Mr Allott criticises Mr Mackay for appearing to be unconcerned about the problem. I did not understand Mr Mackay to be unconcerned at all. The point Mr Mackay was making in his evidence on this issue was that there was no circumstance in which Mr Allott never received payment and that on the occasions when a cheque was dishonoured, the maximum that he would have to wait for payment was five days.

[11] Of course, five days delay in receiving wages that are due and owing is five days too long, because like everybody in society, Mr Allott will have bills to pay and will have automatic payments and other regular deductions from his own bank account which are predicated on the footing that there is money in the account to support those drawings.

[12] The evidence for Super Value Cars was simply that the business was struggling to sell sufficient vehicles in the present economic downturn to meet its overhead costs. Indeed, Mr Mackay told me that this was the very issue that he had been regularly taxing Mr Allott with. Mr Mackay said that the business did not have unreasonable overheads but that it required to sell a certain number of vehicles each week in order to stand still, and when that did not happen, there was an immediate effect on cashflow.

[13] I accept that the evidence is plain that Mr Allott suffered disadvantage, but I am not persuaded on the evidence before me that Super Value Cars was guilty of unjustifiable actions which caused that disadvantage. There was no evidence before the Authority that Super Value Cars was profligate or in any way careless with its money, and indeed the inability of Super Value Cars to meet its day-to-day obligations was, I hold, simply a function of the present economic recession.

[14] Mr Allott also complains that he was disadvantaged by being forced to take holiday leave in order to eke out the employment because Super Value Cars was unable to pay him.

[15] The evidence for this curious state of affairs is sketchy at best. Mr Allott said that there was an arrangement made whereby he would take perhaps one day a week off as annual leave and that this benefited Super Value Cars. Conversely, Super Value Cars said that the time that Mr Allott took off was for his own purposes, and in particular to assist Mr Allott with his family responsibilities and that there was no benefit to the firm in Mr Allott being away from the workplace on holiday leave because he was still on pay. Further, Super Value Cars points out that all holiday pay due and owing to Mr Allott was paid and Mr Allott confirmed that that was accepted. However, Mr Allott maintained his contention that he was, in effect, forced to take days off as leave when he would have preferred to be at work.

[16] I do not find the evidence for this alleged state of affairs in any way compelling and think it more than less likely that any arrangement that was made for Mr Allott to take regular time off was an arrangement which was entered into voluntarily by Mr Allott because it suited him and it was accepted by Super Value Cars because it suited it as well. Certainly, Mr Allott could not satisfy me that there was any evidence of compulsion in the holiday leave which he took on this regular basis. Mr Mackay told me (and I accept) that if Mr Allott has asked for two weeks leave to be taken together, he would have granted such leave but no request was ever made.

The dismissal

[17] Mr Allott was employed pursuant to an individual employment agreement, the terms of which are clear as far as they go, but a signal weakness of that document is its failure to delineate the nature of the responsibilities of the position. There is no job description nor is there any clause in the employment agreement itself which assists in identifying just what the responsibilities of the position held by Mr Allott were to be. This is important because it was a major source of friction between Mr Allott and Mr Mackay during the employment relationship.

[18] Mr Mackay's evidence is that Mr Allott was not employed primarily as a salesman and that the frustration which Mr Mackay experienced during the

employment relationship was primarily because Mr Allott showed no appetite for the other parts of his duties and sought only to sell. While Mr Allott does not specifically quarrel with that evidence, he does place rather more emphasis on the importance of selling cars than on the other responsibilities. Clearly, this disjunct between the principal protagonists caused increasing friction. A succession of written memoranda by Mr Mackay addressed to Mr Allott gives solid testimony to that confusion. The first of these documents is dated 2 December 2007.

[19] That 2 December document could best be described as a step in the process of managing Mr Allott's performance. It also seems to reflect the frustration I have just referred to on Mr Mackay's part in respect of Mr Allott's lack of enthusiasm for the significant parts of his job that he was not attending to. Mr Mackay says at the commencement of para.2:

When I employed you Geoff, you will remember I wanted someone to look after the preparation of the cars for sale, and to be a No 2 salesman. ... It quickly became obvious that your talents and interest lay in sales rather than in preparation. ... I have found it particularly frustrating to mention to you things I have spotted that badly need attention to find them still needing done when I go to demonstrate the car later.

[20] The memo goes on to identify the areas of expectation that Mr Mackay has in respect of Mr Allott's performance, lists the duties of sales staff and includes a whole A4 of selling techniques which Mr Mackay wants Mr Allott to adopt. The whole context of the memorandum is expressed in the opening paragraph when Mr Mackay says:

Our sales are the lowest since we have been here and in order to survive we need to immediately make some changes in the way we are doing things. If we can't make the necessary changes [sic] then naturally our situation won't improve and we will be out of business.

[21] Mr Mackay points out that he, working alone, never sold less than 30 units a month but that with the larger workforce (Mr Allott), it should be possible to sell 50 units a month over the balance of the summer months.

[22] There is a second memorandum very soon after this first example, the second one dated 17 December 2007. This second memo is in similar terms to the first. It again makes the point that Super Value Cars engaged Mr Allott to work in a number of areas, not just the selling of cars. Mr Mackay talks about the need for Mr Allott to be actively involved in what he refers to as *the preparation of cars for sale*. He then

goes on to say that *when the opportunity arises you can be available to talk to customers*. Mr Mackay makes the point that Mr Allott is paid a significant base salary of \$68,000 per annum which he is absolutely insistent *is not intended to be a retainer*. Mr Mackay means that the salary is designed to be recompense for Mr Allott attending to the other non-selling aspects of the role.

[23] In the middle of the first page of this memorandum, Mr Mackay refers to Mr Allott earning \$158 a day inclusive of holiday pay *assuming you sell nothing*. This is a reference to the fact that if Mr Allott did in fact sell a vehicle, he was paid an additional bonus of \$100.

[24] Mr Mackay points out to Mr Allott that it is not good enough for Mr Allott to sit in the office doing nothing when there is work to be done grooming cars or preparing them for sale in other ways. That is part of his obligation and yet those aspects of the job were clearly not being delivered. Mr Mackay requires Mr Allott to maintain a timesheet of his activities (something which on Mr Mackay's evidence Mr Allott refused to do).

[25] Mr Mackay also again emphasises Mr Allott's failures in the selling area, in record keeping, in following up potential customers, in reducing overheads by not sending out cars to get unnecessary workshop work done, and in security, both in terms of finding cars unlocked after hours and even finding the office premises unlocked after hours.

[26] On 2 February 2008 there was yet another memo which again reiterated Mr Mackay's concerns and covered much the same ground as had been covered in the two earlier memoranda to Mr Allott. To emphasise the importance of the content that was reiterated from previous documents, Mr Mackay indicates that the memo *is to be attached to the employment contract and becomes additional or takes priority over any ambiguity*.

[27] There was yet another memorandum, the date of which is uncertain but it is suggested that it was dated 6 February 2008. Again, this memo repeats the themes that Mr Mackay has ended up doing the work that he had hired Mr Allott to attend to, that Mr Allott had so far failed to ever completely groom a vehicle and the net result is that Mr Mackay is spending *little time selling ... whereas apart from occasionally washing the cars, you [Mr Allott] hang around waiting for the next customer*. This

memorandum concludes with some positive observations about some of the areas in which Mr Allott has improved his performance, but the complaints remain about his failure to address the fundamental aspects of his job, thus taking Mr Mackay away from selling which ought to have been his primary focus.

[28] On 13 February 2008, Mr Mackay issued to Mr Allott a memorandum entitled *final warning*. This memorandum addresses exclusively Mr Allott's continuing failure to work appropriate hours at the weekend as the arrangement with Super Value Cars required. The weekend is, of course, the most important selling time for this kind of business, and Mr Allott was warned that his absences without explanation or arrangement on two Sundays had caused dislocation to the firm and, if repeated, would result in a consideration of summary dismissal.

[29] On 19 May 2008, there was an extended discussion between Mr Mackay and Mr Allott. Mr Mackay's evidence (which I accept) was that he discussed again Mr Allott's numerous failures, the various documented references to Mr Allott's shortcomings in the business and in particular the significant aspect that Mr Allott had consistently failed to do what he was hired to do, that is, assist in the preparation of cars for sale as well as actually sell them. Further, the issue about Mr Allott's unreliable timekeeping at the weekends was a factor that was discussed, as was his failure to keep a timesheet as instructed, his failure to account for funds that had been paid to him for his employer and his failure to make sufficient sales to justify the amount of money that he was being paid, notwithstanding his refusal or failure to perform the other duties which were supposed to be part of his obligations to Super Value Cars.

[30] According to Mr Mackay's recollection of that meeting, Mr Allott made a succession of excuses for his inadequacies, complained about the stock that Mr Mackay purchased, continued to resist following up sales prospects as instructed, indicated he would not work Sundays despite that being a requirement, but did suggest that Mr Mackay could dismiss the groomer and Mr Allott would take over those responsibilities. Given Mr Mackay's complaint that Mr Allott had never completely groomed a car, that does not seem to be a particularly practical suggestion.

[31] In any event, Mr Mackay told Mr Allott that his unsatisfactory responses to Super Value Cars' serious concerns about his performance could no longer be

tolerated and that Super Value Cars felt justified in giving him two weeks' notice of the termination of his employment for want of performance.

[32] Mr Mackay says that Mr Allott was shocked and distressed by this turn of events, and accordingly Mr Mackay subsequently came up with a commission-only basis for employing Mr Allott which the latter quickly rejected.

[33] Then, on 4 June 2008, Mr Mackay hand wrote a letter which he describes as *effectively reaffirming my earlier termination notice, and advising him I was no longer going to pay him as per the contract he was in breach of, but offering again the option of his becoming a commission salesman*. Mr Mackay says that he handed this handwritten letter to Mr Allott on the morning of 4 June whereas Mr Allott says that he did not receive the letter until 11 June. I prefer Mr Mackay's evidence on this point.

[34] Ten days later, on 14 June 2008, Mr Allott came to the workplace and cleared out his desk. His only subsequent appearances at Super Value Cars were to receive his final pay entitlements.

[35] Mr Allott asks me to accept that he had no prior notice of the letter which I have just referred to, terminating Mr Allott's employment. I do not accept that evidence of Mr Allott. Indeed, I have to say that I did not find Mr Allott's evidence terribly credible in any respect. His written brief of evidence makes no reference at all to the numerous attempts that Mr Mackay clearly made to have Mr Allott address his deficiencies. When pressed at the investigation meeting, Mr Allott confirmed that he had in fact received those written memoranda and he did remember the 19 May meeting, but he seems not to have thought them important enough to refer to in his written brief of evidence.

[36] No doubt Mr Mackay can be criticised for not properly documenting the job requirements when Mr Allott was hired. I have already made the point that the employment agreement, although complete in itself, did not include a job description.

[37] However, it is plain from the material that I have just traversed that Mr Mackay took very careful and reasonable steps to get Mr Allott to accept that what he was doing was not making a useful and reasonable contribution to the business, and in particular was not achieving the aims and objectives for which the engagement was originally undertaken. I am satisfied that Mr Mackay did his level best to manage

Mr Allott's thoroughly poor performance and the copies of the various memoranda that survive seem to me to be ample testament to that conclusion. No doubt the purist would say that Mr Mackay gives Mr Allott too much latitude or that he is not definitive enough about these documents being warnings (as distinct from simply generalised complaints), but this is not an environment in which the council of perfection can readily be achieved.

[38] Mr Mackay engaged Mr Allott on certain terms and conditions to do certain things in the workplace. When Mr Allott failed to attend to those duties as was originally contemplated, Mr Mackay drew those matters to Mr Allott's attention on a number of occasions, formally in writing and less formally in oral discussion. The themes about Mr Allott's inadequacies are regularly repeated in the documentation. In the result, when it became clear after numerous attempts that Mr Allott was simply not going to do what he had been engaged to do, Super Value Cars gave Mr Allott notice of termination of his employment for want of performance.

Determination

[39] I am satisfied that Mr Allott has neither a grievance caused by unjustified actions of the employer nor a grievance caused by an unjustified dismissal. In my opinion, the dismissal of Mr Allott for want of performance was a justified dismissal. In the circumstances that Super Value Cars was in at the time of Mr Allott's employment there, I hold that a fair and reasonable employer would have reached the decision to dismiss Mr Allott.

Costs

[40] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority