

C. Innolive Limited's application for penalties is declined.

D. Costs are reserved.

Employment relationship problem

[1] Innolive Limited offers accommodation, tours and shuttle services for backpackers visiting Hamilton. Mr Bhogal was initially employed by Innolive as its Assistant on-site manager until he was promoted to On-Site Manager in 2017.

[2] Mr Bhogal took a period of leave from January until March 2018. On his return and after discussions with Mr Soonsam Hwang a director and shareholder of Innolive, he worked for a further two months. At the end of the two months his employment ended. He challenges the ending of his employment which he says was an unjustified dismissal. He also claims one or more conditions of employment were affected to his disadvantage by the unjustified actions of Innolive.

[3] Innolive denies Mr Bhogal's claims. It has made a counter-claim that Mr Bhogal breached the terms of the employment agreement and his obligations of good faith and seeks the imposition of penalties.

Issues

[4] In order to resolve these employment relationship problems I must determine the following issues:

- a) Were one or more conditions of Mr Bhogal's employment affected to his disadvantage by the unjustified actions of Innolive and if so what if any remedies should be awarded?
- b) Was Mr Bhogal unjustifiably dismissed and if so what if any remedies should be awarded?
- c) Did Mr Bhogal breach the terms of his employment agreement and if so should a penalty be imposed?

d) Did Mr Bhogal breach his statutory duties of good faith and if so should a penalty be imposed?

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Disadvantage

[6] Mr Bhogal claims one or more conditions of his employment were affected to his disadvantage when the terms of his employment were altered without consultation.

[7] Mr Bhogal says he was granted approval in July 2017 to take two months leave and he confirmed his tickets in September 2017. Mr Bhogal says once his tickets were confirmed he advised Mr Hwang of the dates of his travel.

[8] Mr Hwang agrees he had a discussion or discussions with Mr Bhogal about him taking a period of leave to travel to India to get married. He denies he saw the tickets in September or knew of the dates of Mr Bhogal's leave until December.

[9] Mr Hwang says he found out during the staff Christmas lunch in December of the dates of Mr Bhogal's travel and he then spoke to Mr Bhogal's supervisor on or about 27 or 28 December who told Mr Hwang he did not know of the dates of Mr Bhogal's leave.

[10] On about 3 January 2018 at a staff meeting Mr Bhogal was presented with a gift of \$200 in recognition of his upcoming nuptials.

[11] Mr Hwang approached Mr Bhogal on 8 January and asked if he [Mr Bhogal] could reduce his leave to one month. Mr Bhogal agreed to look at doing that if Mr Hwang would agree to meet the cost of a new ticket because the tickets he paid for in September were non-refundable. Mr Hwang did not respond to this suggestion and so Mr Bhogal took from that that Mr Hwang did not agree to pay for the change in travel dates.

[12] On 9 January, Mr Hwang approached Mr Bhogal and told him he could take his two months leave but that when he returned he would be working on a different shift.

[13] Mr Bhogal left on his overseas holiday. While he was away, and just before he was due to return to work, his wife became ill. Because they were still overseas, Mr Bhogal requested an additional two weeks leave to care for his wife. Mr Hwang requested medical evidence which Mr Bhogal provided to him. The additional two weeks leave was granted.

[14] When Mr Bhogal returned to work he was told his position was no longer available to him. Mr Hwang told Mr Bhogal he had a position of housekeeper available to him and his hours of work would be six hours per day to be worked on six days of the week. Mr Bhogal was not accepting of these changes. He had previously worked in the On-Site Manager position Monday to Friday inclusive and from 2pm to 10 pm. This was a significant change for Mr Bhogal.

[15] I find on balance that when the parties met on 30 March and 2 April no changes were made to Mr Bhogal's terms and conditions of employment. After not agreeing to the changes in his role and hours of work Mr Hwang advised Mr Bhogal that he would put him back in his role for two months. He was placed back on the roster and worked in accordance with the roster.

[16] Mr Bhogal has failed to establish to my satisfaction that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Innolive Limited and his application for remedies is declined.

Dismissal

[17] Mr Bhogal says he was dismissed on 30 March when Mr Hwang told him that during his absence his job was taken care of by others, that his position was redundant and his position had gone.

[18] Under s 103A of the Act I must objectively determine whether Innolive's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[19] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, Innolive sufficiently investigated issues, raised its concerns with Mr Bhogal, gave him a reasonable opportunity to respond and genuinely considered his explanation prior making the decision to dismiss him.

[20] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Bhogal being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[21] I find it is more likely than not that on 30 March and by his words, Mr Hwang did not intend for Mr Bhogal to return to the role he left in January. On balance I find it is highly likely that the following factors informed Mr Hwang's decision:

- a) Mr Bhogal's supervisor was unhappy with aspects of Mr Bhogal's performance and had formally complained about him while Mr Bhogal was on leave;
- b) Mr Bhogal's supervisor was not told until late December that Mr Bhogal was taking two months leave. The supervisor was unhappy with what he considered to be short notice and the difficulties he would have in rostering staff in Mr Bhogal's absence;
- c) Mr Bhogal requested and was granted an additional two weeks sick leave when his wife fell ill and this exacerbated the difficulties in rostering;
- d) When Mr Bhogal arrived back in New Zealand he requested and was granted an additional 2 or 3 days to recover from his jet lag which also impacted on rostering because the rosters needed to be redone given Mr Bhogal's further absence.

¹ Employment Relations Act 2000 (the Act), s 103A(5).

[22] At the meeting on 30 March Mr Bhogal requested that he be given additional time in his role so that he could apply for alternative roles. When the parties met again on 2 April Mr Hwang, having considered Mr Bhogal's request, agreed Mr Bhogal could continue working in the role for two months. Mr Hwang referred to this role as being a "reception" role, however, I am satisfied the role was the same as the one Mr Bhogal left in January when he commenced his leave.

[23] Mr Hwang considered his consent to Mr Bhogal's request to be a mutual agreement to end the employment relationship on 3 June 2018. At the end of the two month period when Mr Hwang attempted to enforce the agreement Mr Bhogal disputed his right to do so and insisted there was no agreement for the employment relationship to end.

[24] Mr Hwang offered Mr Bhogal a further one month fixed term agreement which Mr Bhogal rejected. Mr Bhogal's employment ended on 3 June 2018.

[25] I acknowledge Mr Hwang attempted to support and accommodate Mr Bhogal's various requests including:

- a) Granting his request to take two months leave for his wedding at the busiest time of the year;
- b) Granting an additional two weeks leave to look after his new wife who was ill;
- c) Granting the additional "recovery" time on his return from India; and
- d) Granting the additional two month's work to look for alternative employment.

[26] At all times Mr Hwang could have declined Mr Bhogal's various requests. He did not.

[27] Mr Hwang made it clear to Mr Bhogal on his return that the role of On-Site Manager was no longer available to him. The absence of any proper consultation about the decision to remove Mr Bhogal's role from him before it was made was not

an action an employer acting fairly and reasonably could make in all the circumstances.

[28] The tasks associated with Mr Bhogal's role were available because the tasks had simply been taken up by others. Those who had covered the role during Mr Bhogal's absence could have been returned to their usual roles. Further Mr Hwang failed to put any of the factors which I have found informed his decision not to put Mr Bhogal back into his role, to Mr Bhogal for his explanation or consideration.

[29] Mr Bhogal was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[30] Mr Bhogal claims lost wages and compensation to resolve his personal grievances. Mr Bhogal found alternative employment and started working for his new employer on 16 July.

[31] Mr Bhogal was out of work for 6 weeks. Based on a 40 hour week at \$19 per hour his loss of wages amounts to \$4,560.

[32] Mr Bhogal was offered a fixed term agreement in May, to assist him with his job search activities. I have considered whether the rejection of the fixed term offer should be taken into account as a failure by Mr Bhogal to mitigate his loss and find the rejection of the offer was unreasonable.

[33] Mr Bhogal had been given two months employment to assist with his job search activities and the offer of a further fixed term provided him with an additional opportunity to find a new job from the position of being in employment. Had he accepted the fixed term offer he would have reduced his lost wages to two weeks.

[34] Accordingly Mr Bhogal is entitled to reimbursement of lost wages for the two weeks between 3 and 16 July 2018 which amounts to \$1,520 gross.

[35] Mr Bhogal claims compensation under s 123(1)(c)(i) of the Act. At the investigation meeting he told me that he had a difficult time after his employment

ended. His employment provided him with not only an income but also his accommodation. He told me he had to rely on friends for accommodation and borrowed money to send to his wife to support her.

[36] In all the circumstances an appropriate amount of compensation is \$7,000.

[37] Under s 124 of the Act I must consider whether any remedies awarded should be reduced due to the conduct of Mr Bhogal if his conduct contributed to the situation giving rise to his grievance. There is no evidence sufficient to make such a reduction.

[38] Innolive Limited is ordered to pay to Mr Bhogal the following amounts within 28 days of the date of this determination:

- c) lost wages of \$1,520 under s 123(1)(b) of the Act; and
- d) \$7,000 under section 123(1)(c)(i) of the Act.

Counter-claims

[39] Innolive claims Mr Bhogal breached clause 11.4 of the employment agreement and his statutory obligations of good faith and seeks the imposition of a penalty against Mr Bhogal.

Employment agreement

[40] Clause 11.4 states:

The Employee will have access to email and the Internet in the course of their employment. The Employee shall ensure that at all times their use of the email and Internet facilities at work meets the ethical and social standards of the workplace. Whilst a reasonable level of personal use is acceptable to the Employer, this must not interfere with the Employee's employment duties or obligations, and must not be illegal or contrary to the interests of the Employer. The Employee shall also comply with all email and Internet policies issued by the Employer from time to time.

[41] Mr Hwang told me he received a letter from Mr Bhogal's supervisor in January while Mr Bhogal was on leave. In his letter the supervisor makes a formal complaint about Mr Bhogal's use of the internet. In his letter the supervisor says Mr Bhogal had visited sites such as YouTube, Facebook, TradeMe, auction sites for cars, and sports websites all of which had nothing to do with his work.

[42] Mr Hwang told me that he undertook his own investigations into the claims and put together a record of the web browser history used on the Reception computer for the period 3 April to 27 May 2018 between 2 pm and 10.20 pm. Mr Hwang has provided this record to the Authority to support his claim for the imposition of a penalty against Mr Bhogal.

[43] There is no breakdown of the actual times the activity took place. The period covered includes weekends when Mr Bhogal was not working and I have not been able to discern whether the figures include those times.

[44] Mr Bhogal's hours of work ended at 10 pm. The record indicates that the search was conducted between the hours of 2 pm and 10.20 pm. It is not known how much of the activity was conducted after 10 pm or during times when Mr Bhogal may have been on an unpaid break. Further, it was common ground that Mr Bhogal's shift was the quietest shift with a lot of downtime. It is not clear how this factor has been taken into account.

[45] Clause 11.4 allows for a reasonable level of personal use. Given that this was an issue raised during Mr Bhogal's employment Mr Hwang had the opportunity to address this issue with him if he wished. He chose not to because Mr Bhogal was leaving the employment relationship.

[46] Innolive has the onus to establish its claim in the first instance. It has not done so to my satisfaction and the application for a penalty is declined.

Breach of good faith

[47] Innolive claims Mr Bhogal breached his statutory duties of good faith by:

- a) misleading Innolive into believing he was working when he was in fact, spending a significant amount of his time on personal internet use;
- b) failing to be communicative and responsive when the employer sought to discuss Mr Bhogal's personal grievance in an attempt to resolve matters and he failed to provide sufficient details for Innolive to address his grievances.

Misleading conduct

[48] This claim relates to the claim that Mr Bhogal breached clause 11.4 of the employment agreement. For the same reasons outlined earlier in this determination I find Innolive has not established to my satisfaction that Mr Bhogal spent the time it claims on the internet and the application for a penalty is declined.

Failing to be communicative and responsive

[49] Mr Bhogal raised a personal grievance in an email addressed to Mr Hwang on 23 May. At this time he continued to be an employee, albeit he was aware his employment was ending and he was in the final weeks of work.

[50] Mr Hwang responded by email the following day and invited him to meet the next day (25 May) to consult him about his grievances, to explain his situation and to advise Mr Hwang of any other relevant circumstances.

[51] Mr Bhogal agreed to meet but advised Mr Hwang he did not wish to discuss or explain his situation in a one on one conversation. He told Mr Hwang it would be better to arrange mediation.

[52] Mr Hwang agreed to attend mediation if the matter was not resolved but insisted on meeting with Mr Bhogal. The parties met on 25 May. Mr Hwang's view of the meeting was that it was not constructive as Mr Bhogal refused to discuss anything with him. Nevertheless Mr Hwang confirmed that that he would actively participate in mediation at Mr Bhogal's request.

[53] Mr Bhogal raised a personal grievance based on the events that occurred following his return to work in April 2018. The parties had attempted to resolve those issues and this resulted in Mr Hwang's agreeing to Mr Bhogal's request for a further two months' work.

[54] I find it is strongly arguable that Mr Bhogal's refusal to discuss his personal grievance with Mr Hwang and to provide him with sufficient information to allow early resolution amounts to a breach of his duty to be constructive and communicative with his employer. However, I am not satisfied a penalty is appropriate in the

circumstances where both Mr Bhogal and Mr Hwang were willing to attend mediation to have the discussion sought by Mr Hwang.

Costs

[55] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Bhogal shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Innolive Limited shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority