

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Annette Busch (Applicant)  
**AND** Prime Television New Zealand Ltd (Respondent)  
**REPRESENTATIVES** John Peebles, for Applicant  
David France, for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 16 August 2005  
**SUBMISSIONS** 30 August, 6 September, 3 October 2005  
**DATE OF DETERMINATION** 20 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Busch was a sales representative whom the respondent dismissed for poor performance in October 2004, following written warnings issued in July 2003 and January 2004. The particular issue of concern to the respondent (as set out in the letter of dismissal) was that her revenue had “*been on decline year on year and that with the exception of July 2004, she had not met target since January 2004.*”

[2] Prime Television Ltd considers that the tests set out in *Trotter v Telecom Limited [1993] 2 ERNZ 659* have all been met and that this dismissal can be shown to be substantively and procedurally fair. Ms Busch disagrees and alleges that she has a personal grievance for unjustified dismissal.

Issues for determination

[3] Ms Busch believes that her dismissal was unfair in the following respects:

- i. The disciplinary process was not fair since the warnings were not expressed to be for the same issue and there were significant gaps between them;
- ii. Her targets were not minimum standards and were not reasonable. They had been set without input from her, had been increased significantly for the year to June 2004 and were much higher than for other sales representatives in the same area;
- iii. At the time her employment was terminated her performance was showing a significant improvement, and

- iv. There was a disparity between her treatment and that of others who failed to reach targets.

[4] I now turn to consider whether there is any substance to any of these allegations and if so whether that renders the dismissal unjustified.

### Was the disciplinary process fair?

[5] Mr Busch received her first warning in July 2003. At that time her revenue was still satisfactory (in May and June 2003 she had made well over 100% of target) but Ms Parr and Mr Jordan had concerns relating to Ms Busch's attitude and behaviour. The warning required her to:

- Improve her attitude and communication style with others in the Hamilton office;
- Improve her communication with Ms Parr, so that she was informed of what Ms Busch was doing on a day to day basis;
- Improve her professionalism with clients.

[6] On 22 January 2004 this was followed up with a warning which was expressed to be final. It identified the following concerns:

- That the number of new prospects listed on her sales reports each week was the lowest in the Hamilton sales region, resulting in a lack of new business;
- That she had a negative attitude in the office, as demonstrated in an alleged comment that she did not care about achieving January target.

[7] The letter went on:

*"I remain of the view that your attitude and performance is not at a level which it should be. I have therefore decided to issue you with this final written warning. Please be aware that if your performance does not improve, your employment may be in jeopardy."*

[8] After this Ms Parr met with Ms Busch on a weekly basis to review sales reports and discuss prospects. By the time of Ms Busch's regular performance review in June 2004 she was found to be making progress although areas for further improvement were identified.

[9] Unfortunately after this Ms Parr did not see the sustained improvement she hoped for. In October she wrote to Ms Busch advising her that: *"With the exception of July 2004, revenue is still below target and appears to be down year-on-year."* She then called Ms Busch to a meeting to discuss this issue and after considering her responses, proceeded to dismiss her on 13 October 2004. The letter of dismissal included the following:

*"Prime has been growing at a rate of 40% over the last quarter... Your revenue has been on decline year on year, and with the exception of July 2004, you have not met a target since January 2004, when you received your final warning..."*

...

*the length of time it takes to bring television campaigns to fruition means that we have given you every opportunity to achieve your targets...we consider it is reasonable to rely on the final warning issued January 2004.*

*We do not accept that there has been any improvement since issuing the final warning in January 2004.”*

- [10] Both Ms Busch and Mr Jordan agreed that because the process to get clients to air takes several months, the time required for a reasonable opportunity to improve was six to eight months. Both also agreed that in these circumstances warnings must remain current for the same time period.
- [11] Ms Busch challenged each of the warnings at the time they were issued. She continues to say that they were not justified. I asked Ms Busch what she thought the January 2004 warning related to. She told me that she understood that her performance, including her sales figures, was considered unsatisfactory and that if her sales figures did not improve her job would be in jeopardy. She told me that she accepted that this warning was clear but had concerns that it was expressed to be final when the first (July 2003) warning had not referred to sales as an issue at all.

### **Determination**

- [12] The period between the final warning and the dismissal was only two weeks over 8 months. Combined with the concessions made by Ms Busch about the currency of the warnings I find that the length of time that passed between the warnings was reasonable in the circumstances.
- [13] However I accept that the warnings were not expressed to be for the same issue. The July 2003 warning says nothing about revenue or sales for the simple reason that there was no issue about these matters at that point. It cannot be relied on in relation to this issue. The January 2004 warning was thus the first warning on the issue of sales, and not a final warning as it was expressed to be.
- [14] Ms Peebles has argued that it is an accepted principle of employment law that the minimum warning procedure is that of an informal or verbal warning followed by a formal written warning prior to a dismissal. I do not agree that two warnings are required in every situation. Here however the employer purported to be following a formal and regular procedure. Having embarked on such a procedure it was obliged to get it right, and to conduct itself in a way that was consistent with a formal process. It was reasonable for Ms Busch to expect not one but two warnings before being dismissed for poor performance in sales.

**Were Ms Busch’s targets minimum standards and were they reasonable?**

- [15] Ms Busch has conceded that in her final year of employment she frequently failed to meet target but says the fact that commission was paid at 80% of target indicates that targets were not minimum performance standards.
- [16] The National Sales Manager for the respondent, Garry Jordan, acknowledged that the company’s targets were set high and said that in general, if sales personnel met 80% of target this was considered acceptable. During Ms Busch’s time with Prime Television Ltd, he said, the commission schemes operated so that consultants were rewarded “*as though 80% was the new 100%.*” **From this I conclude that the targets were not minimum performance standards.**

- [17] The respondent argues however that this does not affect the justification for the dismissal because the principal reason for it was not Ms Busch's failure to meet targets per se but her performance against target and the decline in the revenue she generated. Mr Jordan says that Ms Busch made only 65% of her target in the year to June 2004 which was well down on her performance in the previous year. The question whether the targets were reasonable therefore remains relevant.
- [18] Ms Busch first went to work for Prime Television Ltd in 1998. For several years there were no issues around her performance and she found her targets reasonable. During this time she was accustomed to having the opportunity for input into the setting of her targets. In 2002 this changed when Ms Ellie Parr (nee Kalenteridis) took over as Ms Busch's immediate manager. Ms Parr confirmed to me that it was not her practice to seek input from staff before finalising targets.
- [19] For the financial year ending mid 2003 Ms Busch's target had been increased by approximately 40%. She told me that meeting this was a big challenge. Nonetheless she performed satisfactorily against budget for that year. The company as a whole also did well with growth in advertising revenue of over 80%. Most of that growth was in sales to agencies. Because audience numbers had been increasing nationally, there was an expectation that sales would continue to improve and growth of a further 70% was projected for the financial year ending mid 2004. Sales targets were set accordingly.
- [20] Some sales representatives (including Ms Busch) were employed to handle direct sales only, bypassing the agencies. The total budget for direct sales for the year ending mid 2004 was set at 25% of total projected revenue. I asked Garry Jordan, National Sales Manager, how this figure was arrived at. He acknowledged that unlike the agencies, direct advertisers did not pay much attention to increases in viewer numbers, and so the improvement in audience would not assist direct sales as much as it did sales to agencies. He told me that the target for direct sales was set simply on the basis that in order to cover costs the company needed 25% of its budgeted revenue to come from direct sales.
- [21] The targets of experienced staff across the country were set by applying the expected growth figure to their previous year's results. Ms Busch's targets for the year ending June 2004 were increased by 25% per annum. Because of the seasonal nature of television advertising, targets were set on a month by month basis.
- [22] At the time they were set Ms Busch disputed that the targets for the 2003-2004 year were reasonable. Her main concern was that the 25% overall increase came on top of the previous year's 40%, which she said had been very difficult to meet. She told me that this level of business was beyond what the Waikato area could sustain, and provided evidence showing that audience numbers had not increased as much in that area as they had nationally. She also noted that some of the increase in revenue at the national level was due to the respondent's increased geographic coverage, but there had been no increase in coverage in the Waikato area. In addition, she said that the market had changed and TV3 was now competing with regionally focussed advertising.
- [23] Ms Busch told me that after a successful career in sales she found herself in a stressful and unfamiliar situation where she struggled to meet impossible targets. It would appear that the respondent recognised some of this because when targets were reviewed again in mid 2004 (for the year ending June 2005) it was decided that Ms Busch's targets would be increased by only by 1.3%.

## Determination

[24] I conclude that Ms Busch's targets for the year ending June 2004 were not reasonable. Increases of considerable magnitude had occurred in two consecutive years. These increases were essentially arbitrary, being based on revenue requirements without demonstrable analysis of the capacity of the Waikato market for direct sales.

**[25] Revenue generated against target in the year to June 2004 is not therefore a fair or reasonable means by which to assess Ms Busch's performance.**

Was her revenue in decline at the time her employment was terminated?

[26] The respondent has stressed that Ms Busch was dismissed because her performance had declined year on year. Ms Busch says that in fact, by the time she was dismissed her performance had picked up.

[27] The respondent has also stressed (in part because of the long lead time in pursuing sales) that it considered year on year performance to be critical. I was supplied with Ms Busch's sales figures (actual and budgeted) for the two years to October 2004, as well as sales figures for her colleagues for the latter part of this period.

[28] In the months of February, March and April 2004 Ms Busch's sales figures were well below the figures she had achieved for the same months in 2003. In May, June and July her sales improved, reaching levels at or very close to the 2003 figures. They dropped back in August and September but rallied significantly in October, the month she was dismissed.

## Determination

[29] It is correct to say that overall, Ms Busch's performance between January and October 2004 was down relative to the previous year. However Ms Busch is correct in asserting that there was an improvement in her performance immediately prior to her dismissal.

Was there a disparity between the way Ms Busch and others were treated?

[30] Ms Busch's budget amounted to 27% of the target for her geographic area even though she was only one of a team of 6 representatives working it. Four of the six had been set very low targets because they were comparative newcomers to Prime Television Ltd. Both parties agree that there was thus only one other staff member (whom I shall call Ms J) who could be compared to Ms Busch in terms of experience and in terms of the expectation the company placed on her.

[31] In the twelve months to June 2004 Ms J achieved just on 80% of her budget compared to the 65% Ms Busch achieved. However the actual revenue Ms J generated was only 14% higher than the figure Ms Busch achieved because Ms J's budget was lower than that for Ms Busch (reflecting differences between the markets in their respective geographic areas.)

[32] Of the remaining four representatives one other failed to meet 80% of budget for the year to June 2004.

[33] Mr Jordan considered Ms J's performance to June 2004 to be solid. However from July 2004 her revenue dropped and did not come back up to expectations until November 2004.

[34] **In the months of July, August and October 2004 it was Ms Busch, not Ms J, who generated the highest dollars level of revenue of the six representatives in the Waikato region, and by a comfortable margin.**

[35] I asked Mr Jordan if he thought market factors could have been affecting the performance of the whole team in the winter of 2004. He told me that he did not think so and that the less experienced representatives were meeting their targets. In fact not all were. It must also be noted that their targets were on average just half of what Ms Busch was required to meet. It must be noted also that the retainers of the whole team were similar.

[36] Neither Ms J. nor any of the other representatives was the subject of performance management.

### **Determination**

[37] Although the respondent has shown clearly that Ms Busch's performance in 2004 did not match the standards she had set the previous year, she was still the top revenue earner in her geographic area (by a significant margin) in three out of the four months prior to her dismissal. Her most comparable colleague, Ms J, also experienced a decline in revenue in mid 2004. No other member of the team was disciplined.

[38] **I am satisfied that Ms Busch's treatment was not consistent with that shown towards her colleagues, Ms J in particular.**

### **Summary**

[39] In response to the issues Ms Busch has raised in relation to her personal grievance I conclude as follows:

- There was only one warning relating to sales levels which rendered the disciplinary process unfair;
- The targets have not been shown to be reasonable and were set without input from Ms Busch;
- Although her performance during 2004 was below the levels she had achieved in 2003, it had shown an improvement at the time her employment was terminated;
- There was a disparity between her treatment and that of Ms J, a colleague performing at a similar level.

[40] I consider that a reasonable employer should have given more objective consideration to whether Ms Busch's targets were attainable. Having identified that Ms J's revenue was also down on previous levels, a reasonable employer should have given some consideration to whether other market factors were impacting on sales in this region.

[41] For all these reasons, I conclude that the dismissal was both procedurally and substantively unjustified.

### **Remedies**

[42] Ms Busch received a month's pay in lieu of notice and found a new job almost immediately. Her claim for lost earnings is just \$90.00 over three months. I make no award for lost earnings.

[43] The principal claim is for hurt and humiliation which was not quantified but left to the discretion of the Authority. The respondent has pointed out in submissions that Ms Busch gave very little evidence about the hurt and humiliation she suffered. This is fair comment. In such circumstances, and given that the relief sought was not quantified, I consider myself obliged to proceed very cautiously with respect to this remedy. Taking into consideration also the fact that there was in my view no contributory conduct, I conclude that an award of \$5,000.00 is appropriate.

**[44] The respondent is ordered to pay to the applicant the sum of \$5,000.00 in terms of s.123 of the Employment Relations Act 2000.**

### Costs

[45] I reserve the question of costs. If the parties cannot agree the issue and plan to request that it be determined, they must do so no later than 28 days from the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority