

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 302/08
5103012

BETWEEN JASON CUNNINGHAM
 Applicant

AND ACTION MEDIA LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael McFadden, advocate for Applicant
 Paul Tremewen, advocate for Respondent

Investigation Meeting: 15 August 2008

Determination: 21 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem investigated by the Authority is a claim by Mr Jason Cunningham that he was unjustifiably disadvantaged and then unjustifiably dismissed, by Action Media Limited.

[2] Mediation assistance given to the parties has not resolved that problem.

[3] On Monday 10 September 2007, Mr Cunningham resigned from his employment with Action Media Ltd. As expressly required by his employment agreement he gave notice of four weeks in writing to Mr Sean Mitchell, director of the company. Mr Cunningham had been employed for little more than a month as Business Development Manager for Mr Mitchell's publishing company.

[4] Mr Cunningham began working out the notice period but four days later, on Friday 14 September, he was suspended. Mr Mitchell advised that was because;

I have been threatened by a combination of yourself and Darryn [Mr Cunningham's partner] with a sexual harassment Court case, a humiliation case in the Employment Court, constructive dismissal in the Employment Court and Darryn made a death threat to me while on speaker phone.

[5] Mr Mitchell further advised that he would be complaining to the Police about Darryn's behaviour and then would require a meeting with Mr Cunningham. He said there would be no further contact until the matter was resolved and he asked Mr Cunningham not to return to the office unless invited.

[6] This situation followed from Mr Mitchell making a number of remarks about Mr Cunningham that were seemingly directed at his being a gay man. First, when Mr Cunningham handed in his resignation Mr Mitchell offered to help find him a new job working for a particular gay newspaper or magazine. Mr Cunningham declined that offer, politely saying in an email to Mr Mitchell "*I don't see myself at a gay publication to be honest with you.*"

[7] A further remark was made later on in the first week of the notice period while Mr Cunningham, together with other employees, was receiving a massage in the open office area. The massage was part of a regular service given to the staff. It seems that while he was sitting back-to-front on a chair to receive the massage, his lower back area became exposed. On seeing this Mr Mitchell observed to those present and with some humour that Mr Cunningham's "*bum crack*" or "*butt crack*" was showing.

[8] The third thing Mr Mitchell did a few days after Mr Cunningham had resigned was mimic Darryn his partner. Darryn had left a voice message on the office phone for Mr Cunningham which Mr Mitchell received and then passed on by emulating the voice and tone of Darryn, who he had met and spoken to on earlier occasions.

[9] Mr Mitchell also impersonated Mr Cunningham in his particular mode of speech and mannerisms.

[10] Apart from Mr Cunningham declining the offer of assistance with employment at a gay publication, before Friday 14 September he did not otherwise react or respond to any of Mr Mitchell's puerile and boorish behaviour.

[11] Mr Cunningham's partner Darryn however was angry when told about it. On the morning of Friday 14 September he rang Mr Mitchell and loudly denounced his conduct.

[12] Mr Mitchell's evidence was that over the phone Darryn had screamed words including "*don't mess with us – we'll deal with you,*" although Mr Mitchell said he was not expressly threatened with death. It seems there was also reference made by Darryn in his telephone call to sexual harassment and to court action being taken for constructive dismissal in relation to Mr Cunningham.

[13] Straight after receiving that phone call Mr Mitchell told Mr Cunningham he was being suspended on pay. Mr Mitchell then complained to the Police that Darryn had threatened him over the phone with violence. As a result Mr Cunningham and his partner were visited at home by the Police and questioned about what had been said by Darryn. The Police were apparently satisfied that no further action by them was needed and told Mr Mitchell.

[14] Mr Cunningham remained suspended for the next working day, Monday 17 September, while arrangements were made with Mr Mitchell for a meeting to be held.

[15] On Tuesday at 1pm, Mr Mitchell met with Mr Cunningham and his mother. They discussed what was to happen for the remainder of the notice period. Mr Mitchell was opposed to paying Mr Cunningham out for that time and wanted him to work, but do so from his home rather than the company office. Mr Cunningham was opposed to that idea because Darryn used the office space in their small house for his own job. Mr Cunningham also considered that he had been employed to perform his work for Action Media Limited at its company offices.

[16] There is a dispute as to what happened during the meeting of 18 September after an impasse was reached about how, where or whether Mr Cunningham would work out his notice. Mr Mitchell in his evidence said that he told Mr Cunningham that if he did not continue working for the company he would be regarded as having abandoned his employment.

[17] I prefer the sworn evidence of both Mr Cunningham and his mother and accept from them that the meeting reached a point where Mr Mitchell suddenly announced that Mr Cunningham was dismissed and would receive no further pay. At the end of the meeting Mr Mitchell also required Mr Cunningham to immediately hand back his fuel card and office keys.

[18] I accept the Cunninghams' further evidence that they then asked Mr Mitchell for the decision to dismiss to be given in writing.

[19] Further, I find that Mr Cunningham said he did not wish to hand back his keys until given the dismissal in writing but, after taking advice, he did have the keys and card returned to Mr Mitchell's office the same afternoon.

[20] Later that day at 6 pm. an email was sent by Mr Mitchell to Mr Cunningham at home. It contained pay advice for the period ending the following day, 19 September, under the reference "*Final pay*".

[21] Mr Mitchell produced to the Authority a printout of an email he said he had sent early next day, Wednesday 19 September, at about 6am. Mr Cunningham denied that he had ever seen the email before it was shown to him at the beginning of the investigation meeting. It had not been disclosed to the Authority prior to that meeting and there is no reference to it in the statement in reply.

[22] I find that the email of 19 September from Mr Mitchell, which does not bear an address for the recipient, was not received by Mr Cunningham, wherever it may have been sent to. His office computer had been closed down by Mr Mitchell when he was suspended on 14 September, but there is no reason why he would not have received it at home if it had been directed there.

[23] The un-communicated email can therefore only be relevant as an indication of Mr Mitchell's thinking as at Wednesday 19 September, after reflecting no doubt upon his actions the previous day which, as I have found, included dismissing Mr Cunningham. The email states:

Also this email confirms that unless you return to work to complete your notice period (which you rejected as an option due to embarrassment) or take up the company's offer of working out your notice period from home with mutually agreed tasks that benefit the company, you will not be paid from 2pm Tuesday 18 September. 2pm being the approximately conclusion of our meeting.

If you would like to reconsider the company's offer of working your notice period from home, please feel free to contact me.

[24] Mr Cunningham raised a grievance on 26 September 2007, claiming that he had been disadvantaged and dismissed without justification. The company wrote

back rejecting the allegations set out in detail in the grievance letter, but provided no detail of its own.

[25] The Authority directed the parties to mediation after being advised that the company had opposed attempts to set up a mediation meeting.

[26] The statement in reply lodged on behalf of the company also contained the same paucity of information as the earlier correspondence from it. The company simply claimed that Mr Cunningham had resigned and had not been dismissed or disadvantaged in any way in his employment.

[27] Mr Mitchell has continued to deny that he dismissed Mr Cunningham, who he says resigned. Naturally, Mr Mitchell has not attempted to justify action he claims was never taken by him or his company.

Determination

[28] Applying s 103A of the Employment Relations Act 2000, the test of justification, I find that Mr Cunningham was unjustifiably dismissed on 18 September 2007 by Mr Mitchell. I have accepted the evidence of Mr Cunningham and his mother that Mr Mitchell actually said “*dismissed*” at the end of the meeting held on 18 September.

[29] I find that the dismissal was procedurally and substantively unjustified. There was no formality about the meeting of 18 September, such as a warning that the employment of Mr Cunningham was in jeopardy and that he might be dismissed.

[30] I find that a reason given earlier to Mr Cunningham that he could not return to work at the office because other staff would feel uncomfortable was simply an invention without any basis for it. More likely, Mr Mitchell wanted to avoid looking foolish in front of his staff if Mr Cunningham returned.

[31] The contents of Mr Mitchell’s un-communicated email of 19 September to Mr Cunningham are of interest in that they indicate an apparent change of mind by Mr Mitchell between the meeting on the Tuesday afternoon and early next day. It seems Mr Mitchell decided to take a step back. That is not an unreasonable approach for an employer who has made a hasty decision to dismiss, to reconsider and invite the employee to resume work. Unfortunately, wherever Mr Mitchell may have tried

sending the email to, it was not received by Mr Cunningham who by then, through no fault of his, only had his home email address available.

[32] I therefore find that viewed objectively what Mr Mitchell did on behalf of his company, Action Media Limited, and how he did it, was not what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[33] I do not consider that a separate determination needs to be made in relation to the claim of unjustified disadvantage arising out of the suspension of Mr Cunningham. There was only one working day between the date of suspension and the date of dismissal and the latter had flowed quickly on from the former.

[34] However, although I find that there were no actions directly on the part of Mr Cunningham that would have justified his suspension, it could in some circumstances be reasonable for an employer to suspend where the partner of an employee takes action against the employer or, as in this case, communicates something that the employer believes to have been a threat of violence. Mr Mitchell clearly had some belief in this regard, as he complained to the Police. A suspension may have been justified for a brief period until that complaint could be looked into and until the employer could warn the employee that his partner was to be told not to harass, intimidate or even contact the employer in any way. Mr Mitchell clearly had legal means of restraint such as a trespass notice, if he needed to protect himself against Mr Cunningham's partner.

[35] It is thin and weak for Mr Mitchell to say that suggestions by Mr Cunningham of court action or of claims being brought for sexual harassment, were a reason for him to suspend the employment of Mr Cunningham. It seems that Mr Mitchell enjoyed making jokes at the expense of his employee Mr Cunningham but did not find it so funny when it came to receiving advice that legal action might be taken against him.

[36] This whole matter arose in the first place because of the infantile conduct and behaviour on the part of Mr Mitchell. Without that there was no reason why Mr Cunningham would not have completed his notice by performing work for the company and receiving his pay for it. What happened is almost entirely Mr Mitchell's own fault.

Remedies

[37] To remedy his grievance claims, Mr Cunningham seeks to recover his salary for 3 weeks and 3 days, being the balance of the notice period after 19 September when he was paid up to. He also seeks \$10,000 as compensation for hurt feelings, humiliation and distress.

[38] I find that Mr Cunningham did lose wages as a result of his unjustified dismissal. His claim succeeds to recover the balance owed to him of 3 weeks and 3 days salary, calculated at the usual weekly gross rate of payment. It is accepted by Mr Cunningham that although he had a credit of three days annual leave due to him he was also in debit for sick leave of about the same amount, so nothing is due in that regard.

[39] The total arrears of wages due is an amount of \$3,461.54. Mr Cunningham should have received all of that by 10 October 2007 and has been kept from using his money since then. Interest will therefore be awarded on the lost wages at the rate of 9%, calculated from 10 October 2007 until the date it has been paid to Mr Cunningham. The salary and interest is to be paid to Mr Cunningham by the company.

[40] In assessing compensation to be awarded, the Authority must look at the harm suffered by Mr Cunningham, a man in his early twenties. That suffering is not necessarily proportionate to the relatively short length of employment he had had with Action Media Limited.

[41] I am satisfied from the evidence, including that of his mother, that Mr Cunningham was upset and distressed, physically and mentally by being dismissed. He lost the opportunity of retaining an income for the remainder of his notice period, while he made arrangements to find other work. It is clear that he was affected by the jibes made by Mr Mitchell about his sexuality and I accept that this was largely because it was not behaviour he had been used to. Mr Cunningham became depressed about what had happened, and the overall experience just left him feeling bad. I consider that an award of \$3,800 is appropriate under s 123(1)(c)(i) of the Act. The respondent company is to pay that to Mr Cunningham.

[42] Mr Cunningham is also to be paid \$60, the monthly mobile phone allowance that he was entitled to under the employment agreement and should have received for

the period of notice. As well, he is to be reimbursed the \$70 fee for lodging his claim in the Authority.

Contribution

[43] Although the Authority was asked to find that Mr Cunningham contributed to the situation that gave rise to his grievance, I am not able to do so. I do not consider it to be blameworthy conduct for Mr Cunningham to discuss with his partner things that had happened to him at work – most employees will do that – and neither was it blameworthy for him to wish to continue working at the office where he had been engaged to work, until his notice period expired.

[44] This was not a situation where an employee has been warned about his partner's behaviour towards the employer, so that he could expect some action would be taken against him if there was any repetition of the conduct. This was a one-off event. Darryn's angry response, provoked by Mr Mitchell's behaviour in the first place, was not something that Mr Cunningham could reasonably have been required to prevent or control the first time it happened. No reduction in remedies is required for contribution therefore.

[45] Action media Ltd is ordered to make all of the above payments to Mr Cunningham.

Costs

[46] An award of costs may be sought on behalf of Mr Cunningham if his advocate, Mr McFadden, and Mr Tremewen for the company, are unable to resolve that question. A memorandum should be filed and served in the usual way, with a response from the company within 14 days of service.