

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 320
5313372

BETWEEN MARTIN DAY
 Applicant

AND MULTI MEDIA SERVICES
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Alan Vane for Applicant
 Garry Lough for Respondent

Investigation Meeting: 9 June 2011 at Taupo

Submissions Received: 24 June 2011 from Applicant
 29 June 2011 from Respondent

Determination: 20 July 2011

DETERMINATION OF THE AUTHORITY

- A Mr Day was unjustifiably disadvantaged in his employment with respect to the issuing of a written warning but was not suspended from his employment. No monetary orders have been made against MMSL.**
- B Mr Day's dismissal was justified.**
- C Costs are reserved.**

[1] Mr Martin Day was employed as a graphic designer by Me Creative Limited. In September 2009 the business was sold to Multi Media Services Limited (MMSL) and Mr Day was offered and accepted employment with the new company undertaking the same work and using the same systems operated by his previous employer. A new employment agreement was signed by both parties on 23 October 2009.

[2] Mr Day claims he was disadvantaged in his employment as a result of receiving a warning and then being suspended. Mr Day also claims he was unjustifiably dismissed. MMSL denies the claims.

Unjustified disadvantage

[3] Mr Day has two claims under this heading. The first is that a written warning dated 9 March 2010 was unjustified and secondly, that his suspension was unjustified.

[4] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether MMSL's actions disadvantaged Mr Day in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[5] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If MMSL can establish justification for a disadvantageous action, there is no grievance.²

[6] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

Written warning

[7] Prior to his employment with MMSL Mr Day suffered from an RSI injury. The injury required ongoing attention with his medical practitioner. Mr Day says that on 2 March 2010 he was advised by his doctor that he should not be working more than 3 hours a day. When he returned to work that day, he found it difficult to work and advised his manager, the General Manager of MMSL, Ms Joanne Lough, that he was going home for the rest of the day. Mr Day told Ms Lough that he had a form from his doctor and agreed to leave a copy for his file.

[8] Ms Lough says Mr Day spoke to her about his doctors appointment and advised her that he had a new diagnosis and treatment/rehabilitation plan; that he was to take

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

the day off work and that the injury required 3 weeks of working no more than 3 hours each day. Ms Lough says she explained to Mr Day that they would need to sit down with him and work out how the 3 hour working limitation would be managed in the office.

[9] An ARC18 form relating to Mr Day's appointment with his doctor that day was found on MMSL's photocopier after he had left the workplace. The form was passed onto Ms Lough. The form did not state that Mr Day was to take that day off work, rather the form indicated that the 3 hour working limit was to start that day.

[10] Ms Lough, who was concerned that Mr Day had not been honest with her about being instructed to take the day off, contacted Mr Day by telephone and put to Mr Day, the difference between her understanding of what he had told her and what she had found on the ARC 18 form. Ms Lough required Mr Day to return to the office or to have the form from his doctor rectified to reflect the requirement for him to take the day off work.

[11] An argument ensued. Mr Day understood Ms Lough was requiring him to provide a medical certificate, something he felt she was not lawfully entitled to do given that he was only taking the one day off work.

[12] Ms Lough says Mr Day was asked to get the form corrected or return to work and complete his 3 hours. Mr Day refused to return to work due to his wrists being too sore to work. Ms Lough then invited Mr Day to return to work to attend a meeting to discuss how to manage his limited working hours which would start the following day. Mr Day refused to return to work as he did not have a car to take him into work.

[13] On 4 March 2010 Mr Day was given a letter which set out concerns held by Ms Lough about the response she had received from Mr Day to the request that he return to work and provide a medical certificate. A disciplinary meeting was set down for Monday, 8 March 2010, and Mr Day was invited to attend with a representative or support person. Mr Day requested that the meeting be held that day rather than on the Monday.

[14] Following the meeting Ms Lough issued Mr Day with a formal written warning dated 9 March 2010 for his failure to follow a lawful and reasonable instruction, and for being insubordinate towards Ms Lough and management generally.

[15] An instruction must first be lawful and secondly reasonable. The instruction to return to work to discuss Mr Day's reduction to 3 hours per day was certainly lawful. However I am not satisfied the instruction was reasonable in all the circumstances.

[16] When Mr Day had left the office Ms Lough had told him that she would like to sit down with him "...in the next couple of days..." to discuss how to manage his reduced hours of work.

[17] Ms Lough has not provided an explanation as to why it became necessary to have that discussion that afternoon rather than in a couple of days. Further, while the ARC 18 form did not state that Mr Day was required to take the afternoon off work, there is no dispute that Mr Day had ongoing problems with his wrists. In any event, Mr Day subsequently provided a medical certificate to cover his absence on 2 March 2010.

[18] I find it is more likely than not that Ms Lough had formed a view that Mr Day had not been totally honest with her about needing to rest his wrists. Ms Lough does not seem to have taken into account the fact that Mr Day had no way of getting back into the office that day.

[19] During the telephone conversation on 2 March 2010 Mr Day accepts that he responded poorly and inappropriately. This behaviour continued during the meeting on 4 March 2010 at which time Ms Lough was seeking Mr Day's explanation for his behaviour on 2 March 2010.

[20] I find the warning disadvantaged Mr Day in his employment as it put him closer to a dismissal than would otherwise be the case in the absence of such a warning. I find that the warning was unjustified. The requirement for Mr Day to return to work when his wrists were causing him pain (and this is not denied by Ms Lough) and in the absence of any transport to get him back to work was an unreasonable instruction.

[21] Having said that Mr Day's responses during the telephone call and his conduct in the meeting on 4 March 2010 could have been more cooperative, however standing back and considering the evidence objectively, the decision to issue a written warning was not that action a fair and reasonable employer would have taken in all the circumstances.

Unjustifiable suspension

[22] On 12 March 2010 Mr Day was invited to attend a disciplinary meeting to seek his responses to allegations of serious misconduct, specifically that he had falsified his time sheet and in particular, that he had billed clients for time that had not been spent working on the job. On 15 March 2010 two further allegations of serious misconduct were notified to Mr Day. The allegations related to a breach of his employment agreement and the unauthorised use of images belonging to MMSL which had been developed for clients.

[23] Mr Day says he was suspended from his employment when he was told not to attend work until after the disciplinary process had been completed. Mr Day says that in the absence of any consultation he was suspended and that the suspension was an unjustified action causing disadvantage.

[24] Ms Lough denies Mr Day was suspended. Ms Lough told the Authority that Mr Day was told that if he required time to prepare for the disciplinary meeting he was welcome to take that time away from work and that if he chose to do so he would be paid for the time. Ms Lough says it was entirely Mr Day's decision whether he came to work or used the full time to prepare. At this stage Mr Day was only working 3 hours a day.

[25] The employment agreement provides for suspension on pay to allow an employer to investigate alleged misconduct but only after a proposal to suspend has been discussed with the employee and the employees views of the proposal have been considered.

[26] Ms Lough had sought advice about the possibility of suspension. Mr Day produced to the Authority a copy of an email he retrieved from Ms Lough's email folder in which she advised Mr Garry Lough, managing director, that they were to word the "...suspension as giving time off on full pay so, to that he has time to consider and prepare for Thursday...".

[27] Mr Lough says he did not suspend Mr Day, rather he offered Mr Day the opportunity to take the three days off to prepare for the meeting on 18 March 2010. At the investigation meeting Mr Day agreed that when Mr Lough asked him if he wanted to take the time off, Mr Day asked Mr Lough if he wanted him to take the time off. Mr Lough told Mr Day it was his decision.

[28] On the balance of probabilities it is more likely than not that Mr Lough did invite Mr Day to either take the time off work or remain at work until the disciplinary meeting on 18 March 2010 but did not suspend him. It follows therefore that Mr Day was not disadvantaged in his employment due to an unjustified suspension.

Conclusion

[29] Mr Day has been subject to an unjustifiable disadvantage as a result of the warning issued to him on 9 March 2010 and is entitled to a consideration of remedies.

Unjustifiable dismissal

[30] The employment agreement at clause 22.6 provides examples of the type of misconduct that may render Mr Day liable for warnings or dismissal. Included in the list is a breach of an express term of the employment agreement and conflict of interest. Clause 23 of the agreement sets out the type of conduct which may render Mr Day liable for summary dismissal and includes unauthorised possession of company property and a "...serious..." conflict of interest.

[31] The agreement also provided for confidentiality in the following way:

Confidential information about the Employer's business, other employees or customers remains that way and is not to be discussed outside the workplace or with others.

While you are employed by the Employer you should not be employed or involved in any way with any other enterprise which competes or is likely to compete with its business. Neither should you be involved in any other work which might hinder your ability to perform this job.

[32] The allegations raised with Mr Day on 12 March 2010 related to two instances of Mr Day failing to stop the time recording system and allowing time to be recorded against a client for time whilst he was undertaking non-client related work.

[33] Before those matters were resolved further allegations were raised on 15 March 2010. Those allegations related to an online profile Mr Day had established which Ms Lough believed was promoting Mr Day under his own brand name and using images belonging to MMSL to do so. MMSL says Mr Day did not have authorization to reproduce these images for his own personal gain.

[34] A disciplinary meeting took place on 22 March 2010 and a decision made to dismiss Mr Day for serious misconduct was advised to him on 23 March 2010. The

issue for the Authority is whether the decision to dismiss was, in all the circumstances, what a fair and reasonable employer would have taken.⁴

Timesheets

[35] Mr Day's explanation regarding the timesheets was that he had inadvertently left the time recording system operating while he took a personal call and while he attended a staff meeting. Mr Day explained that it was a mistake and that he did not intend misleading MMSL.

[36] Mr Lough accepted Mr Day's explanation however he also pointed out that Mr Day had received instructions about the importance of accurate time keeping. Mr Lough did not consider Mr Day's actions to constitute serious misconduct but did consider a warning would be appropriate in these circumstances, however, no warning was issued.

Unauthorised use of MMSL's images

[37] Mr Day denied he was marketing his services under his own brand. Mr Day says he was using his own name, and his name was not a "brand". Mr Day told Mr Lough that he had set up an online profile which was accessible only by friends and family and only after they were sent a link to his page.

[38] It was common ground at the investigation meeting that graphic designers will generally have a portfolio of work they have completed to show potential clients. However, it was clear at the investigation meeting that in all cases, images used in such portfolio's had the prior permission from the employer.

[39] It was equally clear that in the past Mr Day had sought the permission of his previous employer to use images in his portfolio, but that he had not obtained the permission of MMSL to use the images which he had published in his online portfolio.

Serious conflict of interest

[40] Clause 25 of the employment agreement prohibits Mr Day from being employed or involved in any way with any other enterprise which competes or is likely to compete with MMSL's business. Mr Day was also prohibited from being involved in any other work which might hinder his ability to perform his job. This clause

⁴ Employment Relations Act, s 103A.

operated with the exception that Mr Day could complete the work for two Northland based private clients he was completing at the time he was employed by MMSL.

[41] Mr Day and Mr Lough discussed this clause at the time Mr Day was employed by MMSL. At that time Mr Day was undertaking private work for two clients based in Northland and Mr Lough agreed that he could continue to finish the work for those clients.

[42] During the disciplinary meeting Mr Day explained to Mr Lough that he had not received any enquiries in the short time the online profile was up and that he merely used it as a mechanism for showing family and friends his work.

[43] Mr Lough concluded that Mr Day's online profile was promoting and seeking work in a personal capacity. Mr Lough's conclusion together with the discovery of unauthorised images being used on his webpage led Mr Lough to conclude that Mr Day's actions constituted a serious breach of his employment agreement. Mr Lough advised Mr Day that the trust and confidence he had in Mr Day had been irreparably damaged and terminated Mr Day's employment.

[44] Mr Aaron Bold, a graphic designer, who was also working for MMSL at the time of Mr Day's dismissal, gave evidence that he has a personal portfolio, although not an online one. The difference between Mr Day and Mr Bold, however, is that Mr Bold had specific permission from his employer to use the images held in his portfolio.

Pre-Determination

[45] Mr Day says the decision to dismiss him was pre determined. To support his allegation he says the locks to the office were changed on or about 15 March 2010 and his email account was closed. I have accepted the evidence of MMSL with respect to both of these matters. In particular I find it is more likely than not that the lock to the door to MMSL was changed after it was discovered that attempts had been made to gain unauthorised access into MMSL's computers.

[46] Mr Day produced copies of emails sent by Ms Lough on 15 March 2010 in which she indicates she is seeking the services of another part time graphic designer. Ms Lough told the Authority, and her evidence is accepted, that MMSL was getting behind in its workload and with Mr Day's work restrictions, she was considering seeking part time assistance to help out while Mr Day was on restricted hours. As

events transpired, Ms Lough did not place any advertisements, nor was a recruitment process implemented.

Conclusion

[47] Standing back and considering the decision to dismiss objectively, I am satisfied this was a decision which would have been made by an employer acting fairly and reasonably in all the circumstances of this case.

[48] Mr Lough accepted the time recording issues were not serious enough to warrant dismissal. However, the issue regarding the use of images owned by MMSL constituted misconduct. It was common ground that all Mr Day was required to do to legitimately use the images for his portfolio, was seek the permission of his employer. Based on Mr Bold's evidence it seems permission would not usually be withheld when used for a personal portfolio. The use of the images and the way they were being used led Mr Lough to conclude that Mr Day was setting himself up in direct competition with him.

[49] At the time of making the decision to dismiss Mr Lough was not required to have evidence beyond a reasonable doubt that Mr Day was in breach of his employment agreement. Mr Lough needed to demonstrate to the Authority that he had enough information to conclude, on the balance of probability that Mr Day was in breach of his employment agreement.

[50] If the intention of Mr Day was to use the company owned images on his web page to advertise his work and seek interest from potential clients then this would have been a significant breach of his employment agreement. It is not clear to the Authority that this was not Mr Day's intention. Indeed when looked at in combination with the information Mr Lough had downloaded from the world wide web which included the current contact details of Mr Day being his address, cellphone number and an email address @insomnis.co.nz it was not altogether too long a bow to draw, that Mr Day was advertising himself on the internet.

Remedies

[51] The Authority has found that Mr Day was unjustifiably disadvantaged in his employment as a result of the warning issued to him dated 9 March 2010. Mr Day is entitled to a consideration of remedies with respect to his personal grievance. There

were no wages lost as a result of his unjustified disadvantage and therefore the only remedy available to Mr Day is that of compensation.

[52] The evidence before the Authority as to hurt and humiliation related only to the claim for unjustified dismissal. In the absence of any evidence pertaining to the effects of the unjustified warning, there will be no award for hurt and humiliation.

Contribution

[53] The Authority is required to consider any contribution by the applicant to the matters giving rise to a personal grievance pursuant to section 124 of the Act. As no monetary awards have been made no consideration of contribution is necessary.

Costs

[54] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, the parties may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Any responses must be filed within 14 days from the date of service. No application for costs will be considered outside this time frame without prior leave.

[55] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority