Determination Number: WA 87/07
File Number: 5079270

**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON OFFICE**

*Under the Employment Relations Act 2000*

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| BETWEEN | Craig Doney (Applicant) |
| AND | X-Facta Resources Ltd trading as Orb Communications (Respondent) |
| Member of Authority: | P R Stapp |
| Representatives: | Nigel Allardyce for Applicant<br>David Patten for Respondent |
| Investigation Meeting: | Wellington, 18 May 2007 |
| Determination: | 28 May 2007 |

## DETERMINATION OF THE AUTHORITY

### Employment Relationship Problem

[1] The Applicant has claimed that he was unjustifiably dismissed from his employment with X-Facta Resources Ltd (X-Facta or Orb). Also, he claimed that X-Facta breached its duty to act in good faith and breached his employment agreement. The Respondent denied the claims.

### Issues

[2] Did Mr Doney and Mr Ted Ward, X-Facta's managing director, agree on new sales targets at a meeting on 19 July 2006?

[3] Did Mr Doney change his mind on any agreed targets on 10 November 2006 when X-Facta says he realised the risk of losing his job became a real possibility?

[4] Can the employer justify its decision to dismiss Mr Doney for poor performance following a fair procedure? In particular, did letters dated 8 September, 4 & 24 October put the applicant on

reasonable notice that his performance had to improve or face disciplinary action, including the possibility of dismissal? Was the time to improve fair?

[5] Did the respondent breach its employment agreement with Mr Doney on variation of the targets and notice requirements? Did the employer breach the requirement to act in good faith?

**The Facts and Findings**

[6] Mr Doney commenced employment with X-Facta on 3 October 2005 as a showroom sales person. X-Facta is a franchise primarily selling cell phones. The parties signed off an individual employment agreement and house rules on 28 September 2005. The employment agreement had an agreed attachment "Schedule 1" making provision for "Additional Matters", including commissions and targets.

[7] Lisa Applegarth, X-Facta's branch manager, says that she prepared a document called "Company Expectations" for Mr Ward to use with Mr Doney at a meeting on 19 July 2006. This document referred to new weekly targets and Ms Applegarth says she gave a copy of it to Mr Doney and another salesperson before their meetings with them separately. At the same time she prepared another document called "My Day Plan" to assist Mr Doney plan his day. The latter document was not challenged. In the lead up to that meeting there were earlier weekly team meetings where sales performances were raised. The purpose of the 19 July meeting with Mr Doney, Mr Ward and Ms Applegarth, was to discuss concerns about the company's sales performance.

[8] Mr Ward and Ms Applegarth say Mr Doney said he was *"happy with the new targets"*, that the new targets were *"easily attainable"* and that he would *"do his best to reach them"*. She says that during the meeting Mr Ward amended the "Company Expectations" document to include *daily* targets (instead of the *weekly* targets referred to in that document). They say Mr Doney agreed with them and in particular the cold call target was adjusted because it was of particular concern to Mr Doney.

[9] The only record kept of the meeting was a one line meeting note made by Mr Ward and his version of the "Company Expectations" document that Mr Doney says he saw for the first time during these proceedings. He acknowledged receiving an original version without revised targets

and that the revised targets were the subject of discussion during the various meetings after 19 July, but denied agreeing to any changes. The new targets were not put in writing elsewhere.

[10] Further meetings included: 23 August, 19, 25 & 28 September, 10, 11 and 15 November 2006. These were followed up with letters from Mr Ward to Mr Doney on 8 September, 4 October, 24 October and 15 November 2006.

[11] The essential themes of Mr Ward's letters were his concerns about Mr Doney's performance in reaching what he called the "agreed targets". Mr Ward recorded that Mr Doney had agreed to the sales targets set around the concerns about sales performance discussed on 19 July. Mr Ward wrote that if the targets were not achieved then disciplinary action would result, with the possible consequence of the termination of employment and dismissal. He referred to the targets in his letter dated 4 October and states that they had been raised at least in the meeting held on 19 July and 19 September.

[12] Mr Doney never replied to the 8 September, 4 October and 24 October letters because he says Mr Ward took him aside shortly after the 8 September letter and assured him that he did not need to be concerned about any disciplinary action. Mr Ward denied that and says he tried his best to assist and support Mr Doney because he did not want to lose him, as it was difficult to get staff. He supported this by saying 4 weeks notice was introduced to employment agreements for that reason, even although he says he overlooked Mr Doney's contractual entitlement later. He says he had a performance issue with Mr Doney.

[13] In the letter dated 24 October Mr Ward served a final warning on Mr Doney and gave Mr Doney 2 weeks to improve or disciplinary action would be taken, which could include dismissal for poor performance (permitted under the employment agreement). He invited Mr Doney to discuss any aspects or concerns about the content of that letter. Mr Doney did not do so.

[14] On 10, & 11 November Mr Ward met with Mr Doney, and his support person, Adrian Giannoti. The possibility of dismissal and any notice were not raised then. In best practice they should have been. At the next meeting held on 15 November Mr Ward told Mr Doney he had no other option but to dismiss him. Mr Doney accepted he could leave with 2 weeks pay in lieu of notice that Mr Ward told him he could have, contrary to the 4 weeks required under the employment agreement.

[15] Mr Doney obtained advice and his representative, Mr Allardyce, took the matter up for him. The parties have not been able to settle their employment relationship problem and thus it has been left with the Authority to make a determination.

**Determination**

[16] My conclusions have been reached applying *Trotter v Telecom Corporation NZ Ltd* [1993] 2 ERNZ 659. The standards for performance appraisal, and if necessary dismissal, have been set out and include:

*(a) Did the employer in fact become dissatisfied with the employee's performance?*

*(b) Did the employer inform the employee of the dissatisfaction and set out the expected standard?*

*(c) Were the criticisms and future requirements objective and readily comprehensible by the employee?*

*(d) Was reasonable time allowed for the attainment of the required standards?*

*(e) After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:*

*(i) Using an objective assessment of measurable targets;*

*(ii) Giving the employee an opportunity to answer the conclusions arising from the trial period;*

*(iii) Listening to the employee's explanation with an open mind;*

*(iv) Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;*

*(v) Exhausting all possible remedial steps such as training, counselling, and redeployment?*

[17] On the matter of procedural fairness *Trotter* requires that the employer place any tentative conclusions before the employee with an opportunity to explain or refute the conclusions. The formal procedures have been well documented, including where in the process dismissal is a prospect the employee must be notified *New Zealand (with exceptions) Food Processing etc IOUW V Unilever New Zealand Limited* (1990) ERNZ Sel Cas 582.

[18] It is my finding that there is no legal requirement for a written variation to the sales targets in the employment agreement. The employment agreement made no provision for written variation. It does provide that the employer can make *"Permanent changes to duties and responsibilities, reporting relationships, or any other matter specified... following consultation with the employee and with reasonable notice"*.

[19] Mr Doney has not established that the revised targets were unreasonable or unachievable from July to November. I am satisfied that he understood what the revised targets were and that Mr Ward expected them to be the performance standard. This is because Mr Doney acknowledged he knew of the revised standards discussed at the meetings. My conclusion is supported by Mr Ward writing to Mr Doney and referring at least once to the detail of the targets that Mr Doney now disputes agreeing to. I am satisfied that Mr Doney understood what was being referred to.

[20] Did Ms Applegarth give the revised version of the "Company Expectations" to Mr Doney? She told me that she gave Mr Doney the original document three days before the 19 July meeting. He denied that. Whether or not he received the revised version does not much matter because he acknowledged that he knew what targets were being discussed. I accept that Mr Ward might have altered the original document during the meeting as he and Ms Applegarth say. There was no reason produced for me not to believe Ms Applegarth. There is no evidence that a copy of the revised version was given to Mr Doney until these proceedings. It is probable that Messrs Doney and Ward had different understandings of the outcome of the meeting without there being an explicit record of any agreement. I also find that Mr Ward's reference to "agreed targets" in his letters and Mr Doney's failure to reply to him, were not sufficient to establish that there was some agreement, given their dispute over any agreement being reached. Furthermore, Mr Doney's evidence that he talked to Mr Ward, who he says allayed his concern about disciplinary action, has not been established because I consider Mr Doney's reaction was at best, as he said, naïve and at worst not plausible, given there were three warning letters that he did not reply to, each putting him on further notice of disciplinary action over performance. I conclude that Mr Doney acquiesced to Mr Ward's demands for new targets.

[21] It is also my finding that because Mr Doney knew of the new targets and acknowledged that they had been discussed it is probable that he left some impression with Ms Applegarth and Mr Ward that he was willing to give them a go. While he may have thought that he had not agreed to any change I am satisfied he has given an impression that he was prepared to give them a go.

[22] However, a fair and reasonable employer would have taken much more care and committed the new targets to writing, given that Mr Doney's employment agreement covered commissions and targets. As such it is implicit that some proper record of any agreement should have been made. Any failings here are not part of the grievance that was raised and indeed would be out of time. They can only serve as background. In any event the employer did not have to put them in writing under the employment agreement.

[23] Mr Doney disputed that he had agreed to the targets and said so to Mr Ward on 10 November with a witness present, Mr Giannoti. That is not in dispute. Mr Ward says that the applicant resiled from his earlier agreement because of the seriousness of his situation. Mr Doney denied that. It does not help Mr Doney that he never challenged the reference to "agreed targets" earlier and it leaves an impression he had resiled from an agreement. I find that the different understanding of the outcome of the meeting held on 19 July and where Mr Doney raised on 10 November that he had not agreed to the revised targets means he should be given the benefit of the doubt that he had not resiled from any agreement. Indeed Mr Doney acknowledged that the new targets were the ones discussed at the meetings. I conclude that it is very likely that these were the targets Mr Doney was working to achieve during the period, because of his inaction to formally challenge them and reply to Mr Ward's letters, even if he did not agree with them.

[24] I have searched the evidence for indications that Mr Doney failed to achieve the required targets for completeness. A document presented supports an argument about whether or not Mr Doney was achieving performance prior to the revised targets. I have no doubt that Mr Ward did consider that Mr Doney was not reaching the performance requirements and the evidence supports Mr Ward having an issue about that with Mr Doney. Indeed Mr Doney's statement acknowledged, in the absence of any detail, that his sales performance did not increase. This is further supported by the factors he says he put forward that he says were affecting his performance. Mr Ward says he considered Mr Doney's suggestions but upon consideration rejected them. That was open to him. An absence of detail and of monitoring performance would certainly be fatal for an employer, but in this case Mr Doney acknowledged that the sales performance did not increase and this had to be based on some known targets. He had a fair opportunity to explain, given the meetings that occurred.

[25] Mr Ward made a decision to put Mr Doney on a final warning with 2 weeks to improve in his letter of 24 October. That letter made it clear that Mr Doney faced disciplinary action, including dismissal, for any continuing poor performance. Mr Ward says he only referred to the

"consequences" that could occur during the meetings he had with Mr Doney. This was not adequate enough, and a fair and reasonable employer would have detailed in best practice what those consequences would be and afford an employee an opportunity to comment and have some input. This was especially so in regard to the imposed final warning and 2 weeks to improve. Ordinarily such a defect would expose an employer to a personal grievance but I have decided that in these circumstances Mr Ward had put his decisions in writing and invited further comment that Mr Doney never followed up. Mr Doney's decision not to reply because of a much earlier conversation he says he had with Mr Ward is not plausible. Mr Doney was given time to respond but did not do so during his employment.

[26] I find that Mr Ward's decision to terminate Mr Doney's employment was decided before Mr Doney had an opportunity to have some input and comment on other options for lesser disciplinary action, given that the letter of 24 October set a timeframe of 2 weeks to improve. The possibility of dismissal and any other options were not properly raised at the meetings on 10 and 11 November for discussion. The opportunity was not given to Mr Doney to have some input and comment because Mr Ward announced his decision having decided that he had no option but to terminate Mr Doney's employment. Mr Ward also imposed 2 weeks notice contrary to the provision for 4 weeks under the employment agreement. A fair and reasonable employer would have checked the proper notice. Proper consultation should have taken place as it did when Mr Doney decided not to work out his notice.

**Conclusion**

[27] Mr Doney has a personal grievance. He was unjustifiably dismissed. Dismissal was within the range of options open to the employer for poor performance given the correspondence in the lead up to the meeting on 15 November as it related to performance, an opportunity to improve and evidence of some support, assistance and attendance at courses. The letters provided Mr Doney of notice that an improvement in sales performance was required and notice of disciplinary action if there was no improvement.

[28] However, Mr Ward imposed his decision to dismiss Mr Doney without giving Mr Doney an opportunity to have some input and comment before reaching his decision and to have given Mr Doney an opportunity to discuss a lesser penalty. A fair and reasonable employer would have raised those matters in a meeting before making the decision he conveyed on 15 November. A fair and reasonable employer would have told Mr Doney of the real possibility and likelihood of being

dismissed on notice before making the decision, because in the current circumstances Mr Ward was relying on a relatively short period for improvement between 24 October and 15 November and had not heard back from Mr Doney. The letter of 24 October that mentioned disciplinary action including the possibility of dismissal was not good enough on its own to rely upon for such notice. That letter left open a prospect that there could be consideration of a lesser penalty that Mr Doney was entitled to have the opportunity to comment on before any final decision. That opportunity was never given.

[29] Although Mr Ward has not followed procedures that best practice would require and had breached the notice requirements, the evidence was not sufficient that supported any ulterior motive to dismiss Mr Doney. There has been the suggestion raised that X-Facta was under pressure to sell more cell phones for Telecom but there has been no linkage established that even if that was so that prevented Mr Ward from making the changes he was permitted to do. Indeed I noted that when Mr Ward was being interviewed by me that he kept referring to "redundancy" in the context of what happened to Mr Doney. The explanation for this can only be that Mr Ward's experience is limited in employment matters and that the business would have been under some pressure to reach other targets. If Mr Doney had any disagreement about the reasonableness of the targets put to him and discussed on 19 July he should have raised his concerns much earlier when he had the opportunity to do so instead of after his dismissal.

[30] Mr Ward wrongly applied the correct contractual notice in breach of Mr Doney's employment agreement. This is a breach action and it is not sufficient to give rise to a personal grievance where the employer is relying upon other grounds to justify the dismissal and Mr Doney did not raise any objection until after his dismissal. Mr Ward's action was made out of ignorance and a lack of any care, especially since he told me that 4 weeks notice had been put into employment agreements because of the difficulty in getting staff. The breach was ultimately corrected but only because of the intervention of a lawyer.

[31] For the above reasons Mr Doney has a personal grievance that relates to the employer's procedural failures in the matter. There will be an impact on remedies because Mr Ward has shown that despite the procedural failings Mr Doney faced the very real prospect, without any other options, of being dismissed for not increasing sales performance.

[32] I now turn to remedies. Mr Doney only applied for 3 jobs and decided not to take up 2 offers of employment because he did not like the terms and that one position was too lowly. I have

decided that his inadequate mitigation of his loss has not been sufficient for me to exercise my discretion to apply more than three months lost wages under the Act. He has made some efforts to look for work and gained some casual work for the equivalent of three weeks work at 8 x hours x $14 per hour. Mr Doney could have reasonably provided me with a summary of details about these earnings but did not do so. Therefore I have assessed his earnings as $1,680. His loss from X-Facta on a base salary of $30,000 gross per annum for 13 weeks following his dismissal would have been $7,500. I have deducted his earnings ($1,680). I have decided also to deduct his 4 weeks notice paid ($2,306). His lost wages are $3,514. I have assessed there is contribution under s 124 of the Act. I have balanced the factors raised by Mr Doney that might have influenced his performance and that he had no input into the timeframe he had to make an improvement in the sales performance. However he was put on notice of the requirements by Mr Ward's letters. A written variation on the targets was not required, although it would have been preferable in best practice. He was on sufficient notice of what was required and had accepted the new targets, meaning that he knew that his sales performance had to be increased. He was on notice of the consequences of what the possible outcome would be if performance was not increased and without any indication that the request was unreasonable. Indeed Mr Doney has not been able to produce any evidence in the Authority's investigation that the revised targets were unreasonable. Therefore I conclude that there must be a further reduction in the remedies and I have decided to reduce Mr Doney's lost wages by a further 2 weeks. I award him lost wages of $2,361 equivalent to the amount of further time that a reasonable employer might have taken to consult and deal with the matter given the procedural failure involved.

[33] Mr Doney's evidence for compensation was primarily generalisations and vague statements without examples and instances to rely upon. He could not provide me with much detail of the impact of the dismissal on him of the employer's shortcomings, although I accept that there was a financial impact on him causing him to borrow money, and that his feelings were affected by his dismissal. He decided not to present any supporting evidence. His evidence was only sufficient for $1,500 compensation. I must reduce this by $500 for contribution as discussed above.

**Orders**

[34] I order X-Facta Resources Limited to pay Craig Doney $2,361 lost wages.

[35] X-Facta Resources Ltd is also to pay Mr Doney $1,000 compensation for the impact of his dismissal on his feelings.

**Costs**

[36] Costs follow the event. Mr Allardyce has capped Mr Doney's costs at $4,850 (including mediation), although Mr Doney says he has not received any invoice yet. I accept that he will incur some costs for representation and preparation for the investigation meeting. Mr Allardyce informed me that $700 was for mediation and this must be deducted. Nothing suggests that I should depart from the principle that mediation costs should not be included as a matter of public policy. This was a relatively straight forward matter and both parties agreed that I rely upon the statement of problem and statement in reply and the supporting documents and letters to adduce evidence from Messrs Doney and Ward. My assessment of reasonable costs in the absence of any invoice and details of the claim is $170 per hour for a 4 hour investigation meeting time using a multiplier of 1.75 is $1,190.

[37] I therefore order that X-Facta Resources Limited pay Mr Doney the sum of $1,190 contribution towards costs and the $70 filing fee.

P R Stapp
Member of the Authority