

[4] Ms Dunlop's performance was reviewed at the one month point, however, no agreed performance targets were set and on 24 April Ms Dunlop was dismissed from her employment.

[5] Ms Dunlop claims the dismissal was unjustified. She seeks remedies for lost remuneration, lost benefits (company car), profit shares and compensation for hurt and humiliation.

[6] Envirostate denies Ms Dunlop's claims and says she chose to unsuccessfully negotiate an exit package after issues relating to her performance were raised with her.

[7] The issue for this determination is whether Ms Dunlop's dismissal was justified pursuant to section 103A of the Employment Relations Act 2000.

The dismissal

[8] Ms Dunlop's main focus when she commenced her employment was in the delivery of an environmental learning package for schools. Envirostate had successfully contracted to the Rotorua City Council and the Waitakere City Council to develop and deliver these programs into the secondary schools located within each of the Council's geographical areas.

[9] Ms Dunlop was required to make contact with each of the secondary schools and sell the program into the schools. Once the schools accepted the program Ms Dunlop and Mr Revfem facilitated the training within the schools and organised an Enviro Challenge for the participating schools at the end of the program.

[10] Ms Dunlop was successful in selling the program into three out of six schools in the Rotorua area and all eight schools in the Waitakere area.

[11] As already set out in this determination, the written employment agreement provided for a three month probationary period. The Job Description reinforced the trial period and included reviews to be conducted at the end of the first month, the third month, six monthly and annually. The Salary package information document produced to the Authority requires an agreed set of performance targets to be set down at the one-month review.

[12] Pursuant to the agreement and at the end of the first month of employment Ms Dunlop's performance was reviewed by Mr Revfem. It was common ground that the

meeting to review Ms Dunlop's employment was short and occurred on or about Friday 11 April 2008. In his oral evidence to the Authority Mr Revfem confirmed that the meeting was a quick meeting and did not contain any detail. He indicated to Ms Dunlop that some things had gone okay but there was room for improvement. Ms Dunlop says she requested that they set some key performance indicators but that did not happen.

[13] I am satisfied it is more likely than not that the focus of the meeting was on what was happening the following week as both Mr Revfem and Ms Dunlop were to be involved in a small business convention and the Enviro Challenge. I find, contrary to Mr Revfem's evidence that it is also more likely than not that no examples of where Ms Dunlop could improve in her performance were provided to her by Mr Revfem at that meeting.

[14] Mr Revfem wrote to Ms Dunlop on 14 April and set out his concerns with regard to her performance. The criticisms set out in the letter are general in nature and do not identify any specific examples of Ms Dunlop's alleged poor performance. Ms Dunlop received the letter on 15 April 2008.

[15] By email the following day Ms Dunlop expressed her surprise with the contents of the letter and requested specific examples of where her performance was lacking. She also suggested discussing and agreeing specific Key Performance Indicators (KPI's) which would allow her to prioritise her work.

[16] Mr Revfem and Ms Dunlop were to be involved in the convention and the Enviro Challenge and so Ms Dunlop requested a meeting to take place on her next working day that she would be in the office, Tuesday 22 April. Ms Dunlop wanted to meet in order to discuss Mr Revfem's concerns. Ms Dunlop and Mr Revfem had previously agreed Ms Dunlop would not work on Monday 21 April as she was moving house.

[17] Mr Revfem read the email from Ms Dunlop on 21 April. He immediately set about trying to make contact with her. Ms Dunlop reports that she had approximately six missed calls on her cellphone from Mr Revfem, and received four messages from him. Ms Dunlop says Mr Revfem was yelling down the phone at her, something Mr Revfem denies.

[18] In any event Ms Dunlop made contact with Mr Revfem who wanted her to attend the office that day to meet with him. Ms Dunlop advised him that she could not do that but was more than happy to meet first thing the following morning.

[19] As arranged Ms Dunlop met with Mr Revfem on Tuesday 22 April at 8.00am. Ms Dunlop asked for further information with regard to the performance issues he had raised in his 14 April letter. In response Mr Revfem dismissed Ms Dunlop and requested she return her keys and cellphone, which she did. Ms Dunlop then left the office.

[20] Mr Revfem wrote by email to Ms Dunlop the following:

Following our employment review meeting this morning I have decided that you will not be permanently employed at Envirostate at the conclusion of your three month probation period, described in your employment contract – attached.

I consider it necessary to terminate your employment at this point on the grounds of the fundamental performance required for the role not being met by you. These grounds were highlighted in your one month employment review letter.

At today's meeting I highlighted my recommendation to you on several occasions for you to take legal advice on this matter.

We agreed to meet at the office at 4pm on Wednesday (tomorrow) to finalise your employment termination arrangements.

[21] As suggested by Mr Revfem, Ms Dunlop sought advice from the Department of Labour advice line which advised her that she could not be fired in this way. She then emailed Mr Revfem and requested the reasons for the termination of her employment, while outlining to him, his obligations pursuant to the Employment Relations Act, particularly the requirements to act in good faith.

[22] It is common ground that Mr Revfem and Ms Dunlop met again the following afternoon (23 April) at 4.00pm. This meeting occurred outside on the main street in Mt Maunganui. During that meeting Mr Revfem produced a document which he read from and which outlined all the areas of Ms Dunlop's performance with which he was unhappy.

[23] At the end of the meeting Mr Revfem returned to his office where he emailed Ms Dunlop retracting his decision to terminate her employment and setting out the agreement that Ms Dunlop would provide a response to the points he raised about her performance.

[24] Mr Revfem acknowledged in his email that he had failed to act in good faith towards Ms Dunlop by not providing her with an opportunity to respond to his concerns about her performance.

[25] As agreed, and after requesting and receiving a copy of the notes Mr Revfem had with him on 23 April, Ms Dunlop provided a full and complete response to Mr Revfem's concerns.

[26] After receiving the written response, Mr Revfem formed the opinion that Ms Dunlop was refusing to take any responsibility for her areas of poor performance and that her response was a denial of any accountability. He emailed Ms Dunlop again, this time requesting that she provide him with ideas about how her performance could improve.

[27] For his part Mr Revfem made the following suggestions which included that Ms Dunlop work from home; that she be taken away from time-pressured operational roles; or that she be given clearly defined tasks and timeframes and descriptions of what levels of ownership and commitment were required from Envirostate. The inference of Mr Revfem's email being that Ms Dunlop should be removed from her job.

[28] In the meantime Ms Dunlop made telephone contact with Mr Revfem. During this discussion Mr Revfem asked Ms Dunlop what her terms were and invited her to email him something.

[29] Over the course of the rest of that day Ms Dunlop and Mr Revfem attempted to negotiate an exit package for Ms Dunlop but that was unsuccessful. That evening Mr Revfem emailed Ms Dunlop and terminated her employment with 30 days notice which he did not require her to work.

[30] While the requirements of fairness are less stringent in the case of a trial employee, the employer must still act fairly. Where an employee proves unsatisfactory in any respect during a trial period, provided the employer has acted fairly the employer is entitled not to confirm their appointment. (*Nelson Air Ltd v NZALPA* [1992] 1 ERNZ 632)

[31] In this matter I find Mr Revfem did not act fairly in bringing Ms Dunlop's employment to an end. Looking at this matter objectively, I find Envirostate's actions and the way it acted to bring Ms Dunlop's employment to an end during the trial period was not what a fair and reasonable employer would have done.

[32] The employment agreement between the parties clearly envisaged the opportunity for Ms Dunlop and Mr Revfem to discuss and agree on performance targets for the remainder of the employment relationship. Having provided for that to happen, Mr Revfem was bound to ensure that occurred. He did not. Instead he became upset at Ms Dunlop's insistence first of all, that she receive full information as to the areas she was not performing and secondly that they discuss and agree performance targets.

[33] Ms Dunlop was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost wages

[34] I am satisfied that the trust and confidence required in an employment relationship was destroyed by Mr Revfem's actions in dismissing Ms Dunlop prematurely on 14 April 2008. However, it is clear that Ms Dunlop would not have had her employment confirmed at the end of the trial period. This was recognised by Ms Dunlop who attempted to negotiate an exit package following an invitation by Mr Revfem to set out her terms.

[35] Ms Dunlop was paid up to the end of her trial period. There is therefore no lost wages for which an order of reimbursement can be made and the claim is dismissed.

Lost benefits – Company Car

[36] Ms Dunlop seeks reimbursement of lost benefits being the company car. The employment agreement provided for a company car to be made available to Ms Dunlop only after successful completion of the three month trial period. I have found that Ms Dunlop would not have been made a permanent member of staff at the end of her trial period. Therefore, I am unable to award any monetary amount for loss of the benefit of a company car as it was not a benefit Ms Dunlop had received during her employment. This claim is dismissed.

Profit share

[37] Ms Dunlop has the onus of proof with regard to her claim for profit shares. She has failed to make out her claim and this was acknowledged by Ms Dunlop at the investigation meeting. This claim is dismissed.

Compensation

[38] Ms Dunlop gave compelling evidence as to the hurt and humiliation she suffered as a result of her dismissal from Envirostate. I find that Ms Dunlop was significantly affected by her dismissal although the employment was only for a short time and she was able to secure another position within a reasonable timeframe given the current economic climate. In all the circumstances of this case and taking into account any contribution on the part of Ms Dunlop, I am of the view that a suitable award, taking all matters into account, would be the sum of \$3,000.

Envirostate Limited is ordered to pay to Ms Dunlop the sum of \$3,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[39] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Dunlop may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority