

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tony Edwards
AND Regent Training Centre Limited
REPRESENTATIVES Stewart King, counsel for Tony Edwards
Murray Broadbelt, advocate for Regent Training
Centre Limited
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 11 April 2007
SUBMISSIONS RECEIVED 16 and 23 April 2007
DATE OF DETERMINATION 21 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Regent Training Centre Limited ("RTC") is a training provider, having its head office in Whangarei. It employed Tony Edwards as manager of its Auckland campuses (in New Lynn and Onehunga) in May 2005.

[2] Mr Edwards was dismissed in March 2006, and says the dismissal was unjustified. He also said a suspension imposed a few days before his dismissal amounted to an unlawful lockout under s 86(1) of the Employment Relations Act 2000. The claim based on the allegation of unlawful lockout was withdrawn at the investigation meeting.

The employment relationship

[3] The parties entered into a written employment agreement, which included a detailed job description. The key responsibility was the management of the day to day running of the Auckland campuses, including responsibility for office administration, the premises and equipment at the Auckland campuses, staff and trainees' welfare, and ensuring the provider's contracted outcomes were met.

[4] Specific accountabilities included:

"2.1 Manage the day to day activities of the Auckland staff

- chair meetings
- give approvals regarding activities and spending within the boundaries set by the Director
- liaise with Head Office in regard to staff applications for time off

2.4 Assist Director as he requires, in the appointment of staff. This may include

- ...
- interviews
- making recommendations to the Director
- induction programmes

2.5 Maintain administrative policies and practices in line with the goals and objectives as communicated by the Director

[5] 'The Director' referred to in the agreement is RTC's managing director, Ian Davidson. Mr Davidson kept relatively tight control over the company's activities, and in particular over its finances. RTC employed a financial director at its head office, but the financial director too was expected to adhere to the policies over which, in effect, Mr Davidson had the final word. The policies incorporated measures aimed at ensuring tight cost control. At the time of Mr Edwards' appointment, the financial director was Frank Gilberd.

[6] Mr Gilberd resigned in November 2005. David Hollis was appointed as finance manager upon the resignation, then as corporate services manager in January 2006.

[7] In the course of reviewing company records in December 2005 and January 2006, Mr Hollis queried with Mr Edwards several matters arising out of the Auckland operation. They were:

- (a) the petty cash spending appeared high;
- (b) a number of wage cheques had been drawn up for a staff member who did not appear on the company's payroll system, and in respect of whom no PAYE was being paid; and
- (c) the spending limit on the Auckland office bank account was exceeded on a number of occasions.

[8] Messrs Hollis and Edwards discussed these matters in a series of email exchanges during January 2006. The two men met on or about 21 February 2006, in order to go over the petty cash concerns and ensure that limits on the use of the Auckland office bank account were clear.

1. The petty cash

[9] One outcome of the discussion was that a petty cash shortfall of \$393, for the period August – December 2005, remained unexplained.

[10] The handling procedure for petty cash was that the cash was kept in a locked tin, which in turn was to be kept in a locked cupboard. Mr Edwards and the office administration manager, Glenda Terrey, both had keys. Anyone wanting petty cash was to approach Mrs Terrey who would record the amount sought, as well as its purpose, in a cash book. Receipts were required for all expenditure.

[11] Mr Hollis raised with Mr Edwards the possibility that procedures were not being adhered to carefully enough, and would need tightening. There was some consensus that petty cash withdrawals were probably not being documented as they should have been, although it does not appear that Mr Edwards indicated he might be one of the culprits. He even suggested to Mr Hollis subsequently that the shortfall might be the result of theft. At the same time he acknowledged there was no evidence of theft – and indeed the suggestion was quite unfounded.

[12] Despite his efforts to obscure or minimise the point during the investigation meeting, it was clear that Mr Edwards was one of the culprits. He did not appear to have made an effort to ensure his own use of petty cash was properly documented, or to ensure that anyone else followed the required procedures. His attempt to hold Mrs Terrey entirely responsible for the latter in particular was unbecoming in a manager.

[13] After the meeting Mr Hollis remained concerned about the petty cash shortfall. In a message to Mr Edwards dated 22 February 2006 he advised:

" ... this is a serious issue and as we were not able to clear it up it may be that our accountants/auditors want to investigate further."

[14] The matter was taken further, being raised as an issue in the disciplinary process which led to Mr Edwards' dismissal.

2. The unknown staff member

[15] Meanwhile, on 22 January 2006 Mr Davidson had contacted Mr Edwards to raise, among other things, the matter of the staff member who did not appear on the payroll.

[16] The staff member concerned was Robynne Cooper. She was engaged in October 2005.

[17] Messrs Gilberd and Edwards told me they had become concerned because their observations suggested Mrs Terrey was very stressed and overworked. Mr Gilberd, however, had observed Mrs Terrey on only one occasion in September 2005 and had not sought to discuss his observations with her. He acknowledged her performance was not giving any cause for concern. Mr Edwards' evidence was that Mrs Terrey had been coming to him asking for help, and he felt she was distressed as a result of her workload. He said he observed her over a period of a week. Both he and Mr Gilberd concluded assistance for Mrs Terrey was necessary, and that Mr Davidson was unlikely to authorise the employment of another staff member. Mr Edwards went ahead and engaged Mrs Cooper without reference to Mr Davidson, securing payment for Mrs Cooper by forwarding weekly invoices to Mr Gilberd. Mr Edwards prepared and signed the invoices, noting they were 'wages' for Mrs Cooper.

[18] When Mr Hollis raised the matter, Mr Edwards explained in January 2006 that Mrs Cooper was a short term casual reliever, engaged to assist Mrs Terrey. The explanation went on to express deep concern about Mrs Terrey's workload and its effect on her health. No mention was made of any other reason for engaging an additional staff member.

[19] In evidence Mrs Terrey expressed herself to be insulted at any suggestion she was not coping with her workload. Although she acknowledged she was busy and welcomed Mrs Cooper's assistance, there was no evidence that her performance was suffering and she had not raised concerns about her workload in the way Mr Edwards was attempting to suggest. Although she approached Mr Edwards about her workload, that was because she was being asked to carry out

additional reporting work which did increase the load, and which she considered was work Mr Edwards should have been doing. As for certain aspects of her physical demeanour on which Messrs Gilberd and Edwards had commented, she had a longstanding medical condition which she was able to manage. It was not causing her undue concern at the time.

[20] Neither Mr Edwards nor Mr Gilberd discussed their concerns or their intentions with Mrs Terrey before deciding to engage Mrs Cooper. Their observations were unreliable and ad hoc, and made over only a short term. The decision to engage Mrs Cooper was not properly thought out, even aside from the decision not to involve Mr Davidson in it. Mr Edwards' explanation that he acted in Mrs Terrey's interests was weak attempt to justify the circumstances of the engagement.

[21] When Mr Davidson found out about the matter in January 2006 he pointed out that the engagement was made without consultation with him, that there was no provision in the budget for such a position, that Mrs Cooper should be regarded as an employee and RTC's obligations regarding PAYE and the provision of a written agreement had not been met. He went on to tell Mr Edwards he wanted Mrs Cooper's employment to cease forthwith.

[22] Mr Edwards contacted Mrs Cooper promptly and advised her there was no longer a position for her at RTC.

[23] That is not all Mr Edwards did to address the circumstances of Mrs Cooper's engagement. On 24 January 2006 he created a document in the form of a letter dated 12 October 2005, addressed to him and to be signed by Mrs Cooper. The letter purported to confirm Mrs Cooper's agreement that she would supply secretarial services for RTC on a part-time on-call basis for such time as might be required. She would be responsible for her own tax.

[24] Mr Edwards asked Mrs Terrey to forward the letter to Mrs Cooper, then pursued Mrs Cooper for her signature with some persistence. Mrs Cooper did not wish to sign the letter, and it was passed on to RTC.

[25] The underlying purpose of the letter was to confirm that Mrs Cooper was not an employee, rather she was a contractor. Even if Mr Edwards had succeeded in obtaining the signature and establishing the point, I doubt that

would have assisted him when it came to his attempt to circumvent the restriction on engaging staff contained in his employment agreement, and his knowledge of Mr Davidson's approach to such matters. The behaviour does not exhibit good faith. Not only that, one of the reasons Mrs Cooper did not sign the letter was that, when Mr Edwards engaged her, her contractual status was discussed and she expressly disavowed any wish to be treated as a contractor. I accept her evidence on the point, although I also accept that Mr Edwards sought to treat her as a contractor.

3. The Auckland office bank account

[26] RTC's financial policies included procedures for the payment of suppliers. Supplier accounts were established at RTC's head office, and suppliers (or RTC offices) were to forward their invoices to head office for payment. It was acknowledged that on occasion items were needed from suppliers on a minor or one-off basis, and it was not always necessary to set up a supplier account. Accordingly the Auckland office had an 'emergency' bank account through which it could make payments of up to \$1,000.

[27] Mr Hollis, who had a longstanding association with the company, told me he had set the account up 10 years ago. The upper limit did not increase during that period. Instead, and although both men were aware of the limit, Mr Gilbert had informally permitted the limit to increase. Mr Hollis acted in December 2005 and January 2006 to re-establish the original limit.

4. An investigation begins

[28] In or about January or February 2006 Mr Davidson approached Thomas Nalder to make independent enquiries about Mrs Cooper's employment, the petty cash shortfall, and a further concern that Mr Edwards was frequently absent from the workplace. Mr Nalder is a consultant and licensed private investigator.

[29] Mr Nalder interviewed Mesdames Cooper and Terrey, and Mr Hollis. He said in evidence that, on the information then available to him, he considered whether to continue his enquiries by way of further investigation or whether it was appropriate to move directly to a disciplinary procedure in respect of Mr Edwards. He concluded the matter was serious enough to warrant moving directly to a disciplinary procedure. So did Mr Davidson.

[30] Accordingly, by letter dated 2 March 2006, Mr Davidson advised Mr Edwards:

"As a result of an investigation by David Hollis, a number of issues have arisen concerning your performance as manager. These issues are:

- (i) financial irregularities;
- (ii) unauthorised employment of staff;
- (iii) wage payments to staff with no deductions for PAYE which are outside the company payroll system;
- (iv) excessive absenteeism from your place of employment during normal working hours."

[31] A meeting on 7 March was sought. Mr Edwards was warned his future employment could be affected, and invited to bring a support person.

[32] Messrs Hollis, Nalder and Davidson attended the 7 March meeting, as did Mr Edwards and his support person. Mr Edwards had been advised, appropriately, that since few details of the allegations he was to answer had been provided, he should decline to comment until the details were provided. He had a written statement, from which he said he read at the meeting, saying:

"... Having read these allegations I am unclear as to their content, and I will need clarification of them.

For this reason I request fully documented support from you of your allegations.

Once I have read them, and after getting the professional advice that I require I will respond to them in a reasonable time."

[33] For his part Mr Nalder had gone to some effort to plan the matters to be covered at the meeting. The issues set out in the 2 March letter would be addressed as follows:

- (a) Financial irregularities – questioning was to cover the petty cash imbalance (including confusion over a particular payment to a tutor), Mr Edwards' alleged use of trainees and tutors to work on his car, and Mr Edwards' alleged engagement of his brother-in-law as a supplier of services and subsequent drip feeding of invoices;
- (b) and (c) – Mrs Cooper's engagement, including Mr Edwards' attempts in February 2006 to obtain Mrs Cooper's signature on the letter regarding her engagement, would be addressed;

(d) Absenteeism – Mr Edwards was to be asked to respond to allegations by Mesdames Terrey and Cooper that Mr Edwards had left the office most mornings by 10 am, could not be contacted when absent, missed scheduled appointments and had been seen at a city gym during the day.

[34] Mr Nalder also had with him notes of his interviews with Mesdames Terrey and Cooper, as well as photographs of RTC tutors or trainees allegedly carrying out work on Mr Edwards' car. Mr Edwards noticed that Mr Nalder appeared to have a bundle of documents. He asked if the documents related to him, and whether he could have copies. Mr Nalder refused.

[35] Messrs Nalder's and Davidson's evidence was that Mr Edwards told them he wanted all allegations in writing and would not discuss anything until then. Nothing turns on whether Mr Edwards read from a prepared statement or not, as the gist of the information Mr Edwards sought to convey obviously was conveyed. Mr Edwards then thanked the RTC representatives and asked them to leave his office. Mr Nalder responded that the meeting would be adjourned.

[36] During the adjournment Mr Davidson came to the view that Mr Edwards' refusal to discuss the issues, along with the attitude Mr Edwards was exhibiting, meant he no longer wanted Mr Edwards in the workplace unsupervised. In addition, he believed he was already aware of: the circumstances of Mrs Cooper's employment and that Messrs Edwards and Gilberd had colluded to conceal the employment; Mr Edwards' attempt to conceal the fact that he had exceeded financial delegations (with reference to the drip feeding of invoices from Mr Edwards' brother-in-law); Mr Edwards' unacceptable method of managing the petty cash; and Mr Edwards' absences from the office.

[37] Accordingly Mr Davidson decided to suspend Mr Edwards on full pay, while he considered the issues and reviewed the evidence. Mr Edwards collected his belongings and left the office.

[38] By 9 March Mr Davidson had decided he had no option but to dismiss Mr Edwards. By phone call and letter of the same date he advised Mr Edwards of his decision. He said he did not accept Mr Edwards' assertion that he was unaware of the nature of the issues, and that the decision had been made on the facts 'as known'.

[39] As far as Mr Davidson was concerned those facts were:

(a) Financial irregularities – there was inadequate balancing and administration of the petty cash, and Mr Edwards had exceeded his financial delegation by 'drip feeding' invoices from his brother-in-law;

(b) Mrs Cooper – employing her without approval and paying her as a contractor, attempting to portray her employment as temporary and 'as required', and the creation of the letter Mrs Cooper was asked to sign; and

(c) Absenteeism – in effect the allegations of Mesdames Terrey and Cooper were accepted.

[40] The letter concluded by saying these actions fell below the standard expected from a manager. Mr Edwards' deceit and dishonesty had destroyed the trust and confidence necessary in the employment relationship, and the employment was terminated forthwith.

Justification for the dismissal

[41] The decision to dismiss was made without Mr Edwards having responded to the issues in the context of a disciplinary proceeding where his ongoing employment was in jeopardy. RTC took the view that Mr Edwards' conduct on 7 March meant that he was not prepared to discuss the issues. That is why it eventually went ahead and made the decision to dismiss without further reference to him.

[42] While Mr Edwards was not entitled to dictate the direction and content of the meeting of 7 March, he was entitled to require more details than were available to him of the nature of the allegations against him. Since the meeting was to be a disciplinary meeting, RTC should have been prepared to provide the requested detail of the allegations as well as any material in support. Mr Nalder should have organised the material he had already obtained and been prepared to make it available to Mr Edwards for discussion at the meeting.

[43] Moreover Mr Edwards did not refuse to answer any questions at all. I do not accept that his behaviour could be construed as a refusal to respond. While his manner of insisting on being provided with details of the allegations in question – not to mention other aspects of his behaviour on 7 March - might have appeared arrogant and high handed, it also struck me as using attack as a form

of defence. Regardless, it was incumbent upon RTC to address the problem and make some arrangement regarding the provision to Mr Edwards of the necessary details. It made no effort to do so.

[44] Finally, I do not accept that Mr Edwards knew, in any event, what the allegations against him were. He had no particulars of the 'financial irregularities' being alleged against him. Since an issue of that kind is potentially very serious it was critical that Mr Edwards be properly informed of the nature of the irregularities and be provided with the material in support. I do not accept he could be expected to guess that the concern was with the petty cash and the use of the Auckland bank account, let alone that dealings with his brother-in-law were to be raised, and nor could he guess at the nature of the concern about absenteeism. It was probably obvious that RTC wanted to address again the matter of Mrs Cooper's engagement, although that is not necessarily the case regarding the extent of the concern. Finally, he had no indication of the nature of the 'excessive absenteeism' alleged against him.

[45] For these reasons I do not accept that RTC was justified in its conclusion regarding Mr Edwards' willingness to respond to its concerns.

[46] Moreover RTC was not entitled to take the view that certain facts were known anyway, and could be relied on in the decision to dismiss without hearing further from Mr Edwards. Several areas required further examination. For example there may have been little more to say about the petty cash matter, although Mr Edwards could have been given the opportunity to comment on how it should be addressed in the context of a decision about appropriate disciplinary action. Second, there was some documentation regarding Mr Edwards' invoicing of his brother-in-law, but that matter required explanation before any decision could fairly be made about its significance in the context of whether financial delegations had been exceeded. Third, there was reasonably detailed documentation associated with Mrs Cooper's engagement, including a series of email exchanges RTC relied on in support of the view that Messrs Gilbert and Edwards had colluded to conceal the matter. The latter, in particular, should have been put to Mr Edwards for comment. Last, the allegations regarding Mr Edwards' absenteeism should have been put to him for comment.

[47] Accordingly RTC's action in going ahead and dismissing Mr Edwards without putting the detail of its concerns to him, and obtaining a response, made the dismissal unjustified.

[48] On that ground, Mr Edwards has a personal grievance.

Remedies

[49] Mr Edwards seeks the reimbursement of remuneration lost as a result of his personal grievance together with holiday pay on that amount, and compensation for the injury to his feelings arising from the personal grievance.

1. Reimbursement of lost remuneration

[50] Mr Edwards' salary at RTC was \$55,000 per annum. On 3 April 2006 he obtained a casual, commission-based sales role for which he received total earnings of \$2,000. On 19 May 2006 he left that position because he had been diagnosed with stress related exhaustion. Unfortunately I was not provided with any further information on the matter beyond Mr Edwards' assertion that his stress was related to events at RTC. His credibility was such that I am not prepared to accept the bare assertion, and additional information I sought from counsel in respect of remedies does not address the point sufficiently. I do at least accept that, on the basis that he had a stress-related condition, Mr Edwards received a sickness benefit from 19 June 2006 – 11 July 2006. On 17 July 2006 he embarked on a fixed term employment agreement with another organisation, and in September 2006 he secured a more permanent arrangement.

[51] Thus Mr Edwards has lost remuneration as a result of his personal grievance. However the above combination of factors means the causal link between the grievance and the loss of remuneration is weakened.

[52] Moreover, the level of Mr Edwards' contributory conduct was such that, were it not for the shortcomings in the disciplinary process, a justified dismissal could have resulted. Some of the conduct amounted to poor management and poor communication, for example the petty cash management and the acknowledged absences from the office (although there was not enough to persuade me the absences were for other than work-related reasons). I have some concerns about the approach to the spending limit on the Auckland office

bank account, but I find quite extraordinary the lack of good faith involved in the attempt to circumvent Mr Davidson's role in the engagement of Mrs Cooper. That alone amounts at least to misconduct.

[53] For these reasons I consider it appropriate to award Mr Edwards the amount he would have received had he been dismissed justifiably and on notice. Since the employment agreement specifies a notice period of 4 weeks, I make a corresponding award. RTC is ordered to pay Mr Edwards the sum of \$4,230.77.

[54] The parties' employment agreement provided for annual leave of 20 days per annum. On that basis holiday pay on the amount awarded above is $8\% \times \$4,230.77 = \338.46 . RTC is further ordered to pay Mr Edwards that amount as holiday pay.

2. Compensation for injury to feelings

[55] The injury to feelings for which Mr Edwards may be compensated is the injury caused by the personal grievance. Here, the grievance arose out of the approach taken to effecting what could otherwise have been a justified dismissal. In those circumstances only a modest award of compensation is appropriate. I accept there was some injury to feelings, and order RTC to pay Mr Edwards the sum of \$3,000.

Summary of orders

[56] RTC is ordered to pay Mr Edwards:

- (a) \$4,230.77 as reimbursement of earnings lost as a result of the personal grievance;
- (b) \$338.36 as holiday pay on that amount; and
- (c) \$3,000 as compensation for injury to feelings resulting from the grievance.

Costs

[57] Costs are reserved.

[58] If the parties seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and exchange memoranda setting out their positions on the matter.

R A Monaghan
Member of Employment Relations Authority