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Flesher v Vent Group Limited AA 309/10 (Auckland) [2010] NZERA 605 (2 July 2010)

Last Updated: 3 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 309/10 5300831

BETWEEN JADE FLESHER

Applicant

AND VENT GROUP LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

K J Anderson

D Feist, Advocate for Applicant

R Narayan, Advocate for Respondent

22 June 2010 at Auckland

2 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Flesher, claims that he has a personal grievance under [s.103\(1\)\(a\)](#) of the [Employment Relations Act 2000](#), in that he was unjustifiably dismissed on 3rd December 2009. The respondent, Vent Group Limited ("the Company"), says that Mr Flesher was not dismissed and left his employment of his own free will.

Background Facts and Evidence

[2] Mr Flesher commenced his employment with the Company on 7th September 2009, as a Direct Marketer. The role involved making telephone calls and generating appointments for the Company's sales people to visit the potential customers and possibly conclude the sale of a heat recovery ventilation system. An employment agreement was signed by both parties. In addition to being paid an hourly rate of \$14.00, Mr Flesher had the opportunity to earn commission or bonus payments, based on achieving appointments with customers, and actual sales achieved. *Key Performance Results* were required, and apparently agreed to by Mr Flesher, as evidenced by his signature on the document and the **LETTER OF EXPECTATION** dated 7th September 2009.

[3] The evidence is that the work performance of Mr Flesher was not satisfactory. This led to a disciplinary meeting on 27th October 2009, between him and Mr Timothy Clark, a director of the Company, and Mr Nicholas Jones, the Direct Marketing Manager. The outcome of the meeting was that Mr Flesher received a final written warning. All of this is set out very succinctly in a **DISCIPLINARY REPORT** of the same date. The main points contained in the report are that:

(a) Mr Flesher had continuing non-performance issues in regard to the number of appointments achieved in a week in that he had failed to achieve the 20 good appointments required, or 80% of these.

(b) There was continued absence from work, with too many days off and this had previously been addressed in

one-to-one meetings.

(c) Mr Flesher had admitted that his performance had been under the acceptable standard, with the quality of appointments being poor, and there were not enough of them. He also acknowledged that his attendance had been "woeful" and that he needed to be at work every day in order to improve.

(d) Having heard Mr Flesher's explanation, Mr Jones and Mr Clark considered that Mr Flesher "does have something to contribute" to the Company but he must improve on his quality, number of appointments and attendance.

The report concludes with expectations in regard to *WHAT NEEDS TO BE DONE TO IMPROVE*. Mr Flesher was expected to:

1. Attend work every day without fail - no excuses to be given as [his] attendance has been addressed on more than one occasion in disciplinary meetings and this is [his] final warning.
2. Improve the quality of his appointments to a weekly quality of 80% or better as outlined in his employment contract and [his] letter of expectation.
3. Achieve 20 good appointments without fail.

Mr Flesher was informed that:

Failure to improve performance or conduct may lead to disciplinary action and/or dismissal. The warning has a time frame of 2 months, expiring on 24 December 2009. It is signed by Mr Jones. There is a provision for Mr Flesher to sign the document also but he did not. The report acknowledges that there is no compulsion to do so, but there is an invitation to state on the report if the employee disagrees or feels disadvantaged.

[4] The evidence of Mr Flesher is that he did not receive the disciplinary report and the associated written warning, but on the weight of the overall evidence, I conclude that it is more probable than not that he did receive this document and furthermore, he was fully aware that he was expected to improve his performance in the areas of customer appointments and attendance at work.

[5] The evidence of Mr Jones is that Mr Flesher was absent from work, without any explanation, on three consecutive working days, Friday 20th, Monday 23rd and Tuesday 24th November 2009. Mr Jones says that on 25th November, he received a phone call from Mr Flesher's partner, Ms Worsno, informing that Mr Flesher would be late to work as he had been detained by a bailiff. Mr Flesher arrived at work at 2:00p.m. Mr Jones attests that he informed Mr Flesher that he needed to contact him directly if was going to be absent and that if such behaviour continued, a disciplinary process would be commenced. Mr Jones says that he also informed Mr Flesher that three consecutive days of absence without satisfactory explanation, amounted to abandonment of employment under clause 13.4 of the employment agreement. Mr Flesher says that he has no recollection of this discussion and also says that Ms Worsno called Mr Jones on 23rd November. Ms Worsno says that she spoke to Mr Jones on 23rd November. But Mr Jones says that the only call he received, during the relevant period of time, was when Ms Worsno called on 25th November.

[6] On Thursday, 26th November 2009, Mr Flesher sent a text to Mr Jones informing that Mr Flesher's grandfather had died. Mr Jones subsequently spoke to Mr Flesher who informed that he would return to work on Monday, 30th November. Mr Jones says that he told Mr Fletcher that if he needed more time off he should contact him. Mr Flesher says that he said to Mr Jones that he would be returning to work on 2nd December. Mr Jones does not accept that this is correct.

[7] Mr Jones attests that Mr Flesher failed to return to work on 30th November and was also absent on 1st and 2nd December 2009 and there was no contact from him. Mr Jones says that he left messages on Mr Flesher's cell phone on 30th November and 1st December enquiring as to why he wasn't at work and enquiring as to where he was but received no response. On 2nd December, Mr Jones again enquired as to where Mr Flesher was and also requested that he attend a meeting the next day.

[8] The evidence of Mr Flesher is that on 2nd December, he left a message on the phone of Mr Jones, saying that he had to take his mother to the airport. Mr Jones has no recollection of this.

[9] The evidence of Mr Shane Clarkson, another Direct Marketer employed by the Company, is that he saw Mr Flesher come into the office at 10:30a.m. on 3rd December and that he phoned Mr Jones, apparently to notify him that Mr Flesher was at work. Mr Clarkson says that he was advised by Mr Jones to inform Mr Flesher that he should leave and come back at 11:45a.m. Mr Clarkson did this. He says that Mr Flesher then cleared his desk of his personal effects, including photos of his children, and then left. The further evidence of Mr Clarkson is that Mr Jones arrived at the office shortly before 11:00a.m. and that Mr Jones commented on Mr Flesher's desk being cleared.

The meeting on 3rd December 2009

[10] A meeting took place at approximately 12:30p.m. Present was Mr Flesher, Mr Jones and Mr Clarkson. The evidence of Mr Flesher is that Mr Jones said to him: *"We're letting you go for not giving enough notice"* Mr Flesher says that Mr Jones further said to him that: *"he had gotten instructions from Tim (Mr Clark) and Will"* (another Director) and that: *"Tim and Will have made their minds up - my hands are tied."* Mr Flesher attests that Mr Jones also said that: *"He would do different if he could."*

[11] The evidence of Mr Jones as to what occurred at the meeting is considerably at odds with that of Mr Flesher. Mr Jones attests that: "As soon as I questioned [Mr Flesher] about his absences and his failure to notify me he said that he had another job lined up and would be starting on 7th December 2009." [Mr Flesher acknowledges that he said that he had another job to go to but he was just putting on a brave face.^[1]] Mr Jones says that Mr Flesher then shook hands with him and Mr Clarkson and left the office. In his oral evidence, Mr Jones added that the situation was "extremely amicable." The evidence of Mr Jones is largely corroborated by that of Mr Clarkson. He says that in addition to shaking hands with him and Mr Jones, Mr Flesher thanked them for their help while working for the Company and said that: "... we were the best and that he would take lots of great memories and experiences with him to his next job. It was all very amicable."

Analysis and Conclusions

[12] The primary question for the Authority is: Was Mr Flesher dismissed, as he claims, or did he resign, as attested to by Mr Jones and Mr Clarkson?

[13] The determination of this question requires an assessment of the credibility (or reliability) of the evidence of Mr Flesher as compared with that of Mr Jones and Mr Clarkson. I have to say that where there is a conflict in the evidence, overall I prefer the evidence of Mr Jones and Mr Clarkson to that of Mr Flesher. It follows that I find that Mr Flesher resigned from his employment of his own free will and that he was not dismissed.

[14] Before arriving at this conclusion, I took into account two particular matters advanced for Mr Flesher that ostensibly, point to his evidence being more likely. Firstly, Mr Flesher says that he did not clear his desk of his personal effects, including a photo of his children, as he had no personal effects at his work place apart from the photo, but he took this home some time in November 2009. On this matter, Mr Jones and Mr Clarkson acknowledge that they may have been mistaken about the clearing of Mr Flesher's work station and that Mr Flesher may have taken the photo away earlier.

[15] The other matter drawn to my attention is that, as evidenced from his bank statements, the net sum of \$477.64 was paid into Mr Flesher's bank account on 2nd December 2009, the day before the termination of his employment. Mr Flesher says that this was a final pay and shows that his departure was predetermined. Mr Clark says that this is not so and produced a pay record showing that Mr Flesher was paid a gross sum of \$643.76, of which \$531.76 was holiday pay with the remainder, \$112, being payment for one day. Mr Clark explained that this payment was paid via the normal weekly pay run. The decision to make this payment to Mr Flesher was made solely at the discretion of the financial controller, Sam, (also a shareholder in the Company) whom apparently had observed that, due to the time that Mr Flesher had been absent, he had no wages due. Knowing that Mr Flesher had a family and other commitments, Sam used his inherent discretion to make this payment to Mr Flesher.

Mr Clark was emphatic that the amount paid to Mr Flesher was not intended to be a final pay. I accept that this is so. Mr Clarkson also attested that the Company does make "special" payments in certain circumstances.

[16] Mr Clark also attested that in the event that serious disciplinary action is required in regard to any employee, he would be present, and that Mr Jones does not have the authority to dismiss.

Determination

[17] I find that Mr Flesher was not dismissed on 3rd December 2009 and that he resigned of his own free will. Mr Flesher does not have a personal grievance and his claims are dismissed.

Costs

[18] It is the understanding of the Authority that the respondent's advocate, Mr Narayan, is an employee of the Group of which the respondent company is a part; hence any cost considerations are probably not applicable. In the event that I am mistaken about this, the respondent has 28 days from the date of this determination to file costs submissions, with a further 14 days allowed for any submissions in response from the applicant.

K J Anderson

Member of the Employment Relations Authority

[1] The bank statements show that the Mr Flesher received a WINZ benefit payment on 29th January 2010.