

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 40
5437919

BETWEEN DARCY FRASER
 Applicant

AND THE GOOD GUYS GROUP
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: B Paradza for the Applicant
 N Anderson for the Respondent

Investigation Meeting: 25 March 2014 at Wellington

Submissions Received: 25 March 2014

Determination: 24 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Darcy Fraser, claims that he was unjustifiably dismissed from his position as Territory Manager, selling products from his truck for the respondent (The Good Guys). He also claims that he was underpaid for hours worked and commissions earned and unlawful deductions were made from his pay.

[2] The Good Guys claims that Mr Fraser was properly paid throughout his employment and that he was justifiably dismissed, principally for abuse of a member of the public and a senior management in the company, which, when coupled with an extremely negative attitude towards the company, meant that he could not be trusted to not breach his duty of fidelity to it. During the course of the investigation meeting, The Good Guys accepted that it had not properly paid Mr Fraser for some of the hours

worked to the value of \$122.74 gross, and that it had improperly deducted \$10 net from his final pay, and undertook to pay Mr Fraser those amounts.

[3] I also identified, pursuant to s.122 of the Act that Mr Fraser may have a personal grievance of a type (duress) other than the alleged unjustifiable dismissal. Mr Fraser's behaviour which may come within the definition of duress included being an authorised representative of other employees, namely his son, and being directly or indirectly threatened with a disadvantage to his employment by its Regional Sales Manager, Mr Brent Turner, with the intent to induce him not to act on his son's behalf. The Good Guys were on notice from the commencement of these proceedings that Mr Fraser considered that he had been unfairly treated by The Good Guys after he informed Mr Turner that he would be advocating for his son at a disciplinary meeting.

[4] Of particular import in this investigation was that Mr Turner failed to attend the investigation meeting without notice, despite The Good Guys being on clear notice from the conference call that all witnesses would be required to attend in person. Where, as here, there are matters of credibility, it is not acceptable for a witness such as Mr Turner to decide, without reference even to his employer until the day of the investigation meeting, that he would not be attending, but would be available by mobile phone. No reason was given for his non-attendance.

Factual discussion

[5] The Good Guys operate a business selling clothes and other goods, together with other forms of retailing such as a Christmas club, via drivers with trucks that travel to peoples' homes. Mr Fraser was employed as a territory manager driving a truck by The Good Guys, to cover one of three Wellington territories, from on or around 12 November 2012. He signed an individual employment agreement that contained a fairly complex structure for remuneration. In essence it provided that the employee would be paid by way of commission, but that if commissions did not lead to remuneration in excess of \$600 per week, the employee would be paid that gross sum as a retainer. As a result, in effect the benefits of the commissions did not kick in until after more than \$600 per week in commissions had been earned. The individual employment agreement also set out how a percentage of commissions might be subsequently deducted should orders not follow through to actual sales or (given that many sales were effectively on hire purchase type arrangements) payment in full was not subsequently received by The Good Guys.

[6] Mr Fraser complained of this latter arrangement, considering that it effectively meant he was funding The Good Guys' bad debts, but it can clearly be seen within the employment agreement that debt management was a fundamental factor in determining performance. This is understandable given that the fewer bad debts the more money The Good Guys made and the more commissions Mr Fraser would earn. It therefore follows that I do not accept that Mr Fraser was funding The Good Guys' bad debts as such. Overall, this was an effective commission structure in law because the retainer ensured that employees such as Mr Fraser were remunerated each pay period in excess of the minimum wage.

[7] I therefore dismiss the claims for commission because, as Mr Fraser accepted, apart from the hours of work issue, he was always paid in terms of the employment agreement, which he had agreed to. Mr Fraser highlighted times when he had had his pay deducted when the company, using the satellite tracking system on his truck, considered he was not working, but on assessment, The Good Guys agreed to refund him those amounts, together with the wrongful deduction of \$10 for a sweepstake.

[8] There remains, however, the claim for additional hours worked above the 44 hours provided in the contract. I accept Mr Fraser's claims that he often worked 50 to 60 hours per week, rather than the 44 hours set by the company. However, there was no obligation on Mr Fraser to work these hours. It was not covered in the employment agreement, which set out 44 hours as the maximum expected weekly hours of work and I accept the evidence of Ms Ngaire Anderson, the General Manager of The Good Guys, that many territory managers would earn commissions well in excess of the retainer on a 44 hour week. Unfortunately, Mr Fraser was not able to do so, most likely for reasons outside of his personal control, as the territory he was responsible for had been severely neglected by his predecessor. I also accept that no-one required Mr Fraser to work in excess of 44 hours per week. I therefore dismiss his claims for extra hours worked, except as agreed to by the Good Guys above.

[9] Mr Fraser was instrumental in having his son appointed to another territory manager role in the Wellington region. During his son's trial period, The Good Guys were concerned that Mr Fraser Jnr was not meeting his sales targets. They determined to hold a disciplinary meeting with him. Mr Fraser agreed with his son that he would advocate for him at that meeting.

[10] It is clear that the content of the discussion that followed on 4 March 2013 between Mr Fraser and Mr Turner is disputed. Mr Fraser told The Good Guys that he had a tape of that conversation, but no such tape was ever provided. Despite that, I accept Mr Fraser's version of the conversation. He was clear throughout his evidence and accepted points that were to his detriment, such as his behaviour at the disciplinary meeting. On the other hand, Mr Turner chose to avoid his responsibilities to give evidence on oath.

[11] I therefore conclude that Mr Turner, who was prone to bad language, criticised Mr Fraser, using such bad language, about his advocacy for his son. He was told that his son was just not doing his job and that he did not need an advocate. Upon being informed that Mr Fraser intended to continue advocating for his son (as was his legal right), Mr Turner told him that he too was not achieving his targets so that his job could also be in jeopardy. Mr Fraser swore and asked for the comments to be repeated and was told by Mr Turner that he had *blown it* for his son now. Despite numerous attempts to get Mr Turner to elaborate on this view, both orally and in writing, Mr Fraser never received a response.

[12] Mr Fraser was unnerved by this call and almost straight thereafter got into an argument with a member of the public, who was running down the company and the location of his truck, at the same time as swearing at him. He responded using swear words and questioned her sanity.

[13] Mr Fraser then rang Ms Anderson to complain about the threats that had been made by Mr Turner towards him. She noted that Mr Turner had already spoken to her and that there were *two sides to every story*. Mr Fraser was in such a state that he asked for the rest of the day off on pay, but was told that he would not be paid if he did not work. In that call, Mr Fraser also admitted to using bad language to the member of the public, and also ran down Mr Turner, using profane language.

[14] Soon thereafter, Mr Turner texted Mr Fraser to say that he had not told him his job was in jeopardy or that he had blown it for his son. For obvious reasons Mr Fraser did not accept the content of that communication. His response was to text back stating, among other things, *you will have a complaint laid against you in the very near future so be careful what you say to me*.

[15] As a result of these interactions, The Good Guys decided to bring forward a performance review for Mr Fraser, and to hold a disciplinary meeting with him, all to be held on the same day as the disciplinary meeting for his son. Mr Fraser was informed of the meeting orally and in writing. The disciplinary meeting was said to cover the following matters:

- *Not to do anything whereby the goodwill and reputation of the employment may be prejudicially affected* (the comments made to the member of the public on 4 March);
- *Any serious misconduct or non-performance* (not meeting company minimum sales expectations);
- *Harassing or discriminatory behaviour* (using profane and derogatory language about The Good Guys' HR manager and the regional sales manager, and threatening to lay a complaint about the regional sales manager).

[16] Mr Fraser was also informed that he would be given the opportunity to offer explanations, which would be considered prior to any action being taken, but also that such action could include a written warning or instant dismissal. Mr Fraser was also told that he was entitled, indeed encouraged, to have a representative at the meeting, which was to be held in four days' time, two days of which were the weekend. Mr Fraser chose not to have a representative present given the time constraints, but that was his election. There was no evidence to suggest that The Good Guys would have refused him an adjournment had he sought one prior to the meeting.

[17] Mr Fraser suggested during the meeting that if at any time he wished to stop the meeting to have a representative he would. Although The Good Guys refused to accept this point, in actual fact Mr Fraser never sought to stop the meeting to get representation, so his concerns here are academic, as is not for an employer to organise representation for an employee and Mr Fraser never formally asked for the meeting not to proceed so he could obtain representation.

[18] The three meetings were, however, brought forward by an hour giving Mr Fraser less time to prepare. Fortunately, he had prepared two statements, one to cover the performance issues and the other to cover the alleged serious misconduct issues.

[19] While I understand that it saves significant money for The Good Guys, which is a national organisation based in Auckland, to combine performance reviews with

disciplinary meetings when the latter is necessary, this is not good business practice. It can lead to unfairness to employees and almost certainly to claims of predetermination where dismissal follows.

[20] In this case there was indeed a claim of predetermination - based on what somebody in the Palmerston North office allegedly told someone in the Wellington office who then told Messrs Fraser, namely that one or both was to be dismissed. In the absence of any stronger evidence than that, I accept The Good Guys' explanation that this was most likely rumour and speculation on the part of some employees because Ms Anderson was coming down from Auckland for two disciplinary meetings.

[21] In the performance review part of the meeting, I accept that Mr Fraser was not given a full opportunity to give his responses. This is clear from his pre-prepared notes (several pages long and containing significant financial detail) much of which was never mentioned in the meeting. It appears that The Good Guys wished to focus primarily on the disciplinary meeting. As a result, it was not in a position whereby it could fairly and reasonably conclude that Mr Fraser was incapable of meeting the targets set for him by The Good Guys. In any event, he had no opportunity to do so after the meeting. This is despite the normal policy of The Good Guys being to allow an underperforming employee at least two opportunities, following counselling and warnings, to meet the targets over a set period of time.

[22] Mr Fraser's behaviour during his meetings, which was also attended by his son, was at times quite unacceptable and in his own words he was *not proud of how [he] acted*. Examples of this included:

- Mr Fraser refusing to shake hands at the beginning of the meeting with either Ms Anderson or Mr Turner;
- Mr Fraser insisting that the meeting was his meeting rather than that of The Good Guys;
- Mr Fraser swearing on occasion; and
- Mr Fraser making sarcastic comments, even before his dismissal, directed to both Ms Anderson and Mr Turner.

[23] The upshot of the meeting was that Mr Fraser declined to admit that he had done anything wrong in his interactions with any of the others who the company believed he had harassed or abused, including the HR Manager, although he did deny swearing about her. Instead, Mr Fraser criticised the company's products, the way it was run and the standard of its management.

[24] Mr Fraser also told Ms Anderson that a personal grievance would be lodged against her for her failure to deal with his complaint about the Regional Sales Manager.

[25] After an adjournment, Ms Anderson returned to summarily dismiss Mr Fraser, focussing on his attitude towards "*some of the key people in the company and the company itself*", together with filing personal grievances, which showed that his attitude was such that she did not believe that the employment relationship could continue. This was on the basis that he was not working to the company's objectives, he was not loyal to it and as a result she could not see how the employment relationship could continue.

[26] After that point, Mr Fraser's attitude and behaviour deteriorated more. He was particularly upset at being told that his pay would not be available for another week.

[27] In the dismissal letter prepared the next day, The Good Guys noted Mr Fraser's hostile and disrespectful behaviour at the meeting, that his explanations over his non-performance showed a lack of belief in the company's products and objectives and that he intended to raise matters of concern in the public arena. In summary, The Good Guys stated:

Based on your attitude of recent times and at this meeting, we simply cannot see the employment relationship continuing as you are constantly talking about filing personal grievance(s) and in general your attitude towards the company and the company's senior managers is extremely unhealthy.

Employees have a duty of fidelity to uphold with their employer and with the uncompromising attitude you have displayed, we believe it is such this cannot be restored.

[28] The significant reason for Mr Fraser's dismissal was not so much the responses he made at the disciplinary interview but the manner of them. However, these were very significant in The Good Guys' eyes because the company had only envisaged giving him a warning for the live issues prior to the meeting. The Good

Guys also took into account its view that Mr Fraser's defence of his performance involved a lot of negative comments about the quality and pricing of its products and the quality of the support he received, amongst other things.

[29] A personal grievance for unjustifiable dismissal was subsequently raised and then filed with the Authority on 4 November 2013. Despite mediation, matters remain unresolved.

Determination

[30] While the Act states that only employees who act on behalf of other employees (the plural) can be subject to duress, Section 33 of the Interpretation Act 1999 provides that words in the singular include the plural (and vice versa) unless the meaning should be restricted by context. Here, the context is protection of employees who are treated unfairly for representing other employees and therefore there is no reason to believe that Parliament would have not wanted to protect an employee who represented one employee any more than one who represented several.

[31] I conclude that Mr Fraser was subject to duress in his employment because Mr Turner, as a representative of The Good Guys, either directly or indirectly threatened or did impose a disadvantage on Mr Fraser (namely, making his job less secure by threatening it), with the intent to induce Mr Fraser not to act or to cease to act on behalf of his son. This had a significant impact on Mr Fraser because it provided an important part of the reasons why he behaved the way he did at the performance review and disciplinary meetings on 12 March. Thus while there were other factors for his behaviour, and he must take ultimate responsibility for his own behaviour, as set out below, this was a major reason for him behaving that way.

[32] Mr Fraser fervently and correctly believed that he should not be disadvantaged for representing his son at a disciplinary meeting. The whole purpose of the protection provisions in the Act relating to duress is to ensure that employees who take on a role in assisting other employees in their employment are not disadvantaged as a result.

[33] It follows that not only was Mr Fraser disadvantaged as a result of the threats and/or actions by Mr Turner, it also impacted on his behaviour when making intemperate comments to a member of the public very soon thereafter, all of which partly led to his dismissal.

[34] Mr Fraser was very clear in his evidence about the unfairness of these actions by Mr Turner, and even although I accept that Ms Anderson was not part of these threats and/or actions and that this issue played no part in Mr Fraser's dismissal, compensation in the sum of \$7,500 is appropriate, as his evidence on the impact on him was supported by his son, who was the one he was trying to help. No doubt it was extremely humiliating for Mr Fraser, knowing he was doing the right thing in supporting his son, to be punished for simply doing what was right by his family and in law.

[35] The claim for unjustified dismissal is, however, dismissed. I accept that The Good Guys, through Ms Anderson, who was the key decision-maker, was not influenced in its decision to dismiss by Mr Fraser's decision to represent his son in disciplinary proceedings, despite Mr Turner's threats. Rather, Ms Anderson made her decision based on events that had occurred being reported to her independent of Mr Turner's actions (such as his comments about the HR manager) and as demonstrated by Mr Fraser's behaviour at his performance management/disciplinary meeting.

[36] Given the resources available to The Good Guys, a medium sized firm of some 20 odd sales staff and ancillary staff, there was sufficient investigation of the allegations against Mr Fraser. Mr Fraser was informed of all the allegations that were to be discussed at the disciplinary meeting. I have already noted that given the resources of The Good Guys it was not unfair, although not good practice, to follow a performance review meeting with a disciplinary meeting.

[37] Given that Mr Fraser was not dismissed over the performance sales issues, it follows that any failure to give him a full opportunity to respond to those issues was not relevant to the decision to dismiss, and in any event if there was a process defect it was minor and did not, for the above reason, result in him being treated unfairly. By contrast, Mr Fraser was given a reasonable opportunity to respond to the particular claims of serious misconduct, as opposed to the sales shortfalls.

[38] I also accept that The Good Guys genuinely considered Mr Fraser's explanations, as it was Mr Fraser's explanations that actually compounded the problems he faced. Furthermore, in complete contrast in the claim for predetermination, it had not been within Ms Anderson's contemplation in advance of the meeting that dismissal would result.

[39] While Mr Fraser takes issue with the decision to summarily dismiss him, I conclude that this was a decision open to a fair and reasonable employer, i.e. what a fair and reasonable employer could have done, because Mr Fraser had used intemperate language towards a member of the public and this could have impacted on The Good Guys' business and was unacceptable, as even Mr Fraser was inclined to accept with the benefit of hindsight. In addition, Mr Fraser's behaviour about management staff being *useless*, when combined with pejorative and demeaning comments about them, could be categorised as harassing or discriminating behaviour. Mr Fraser did himself no favours by his attitude and comments at the disciplinary meeting, from which a fair and reasonable employer could have taken the view that he had committed serious misconduct on the occasions alleged, and that he could do so again in similar circumstances. This can be evidenced by the extent and degree of his use of intemperate language at the disciplinary meeting, which even the duress to which he had been subjected some days previously could not absolve him. His behaviour at the disciplinary meeting was such that it basically established the concerns that the employer had earlier put in writing, to the extent whereby summary dismissal was open to it.

[40] While I remain concerned that The Good Guys did take into account threats of personal grievances being raised, which would be improper, I accept that Ms Anderson understood at the time that employees were entitled to bring personal grievances and was simply using that issue as further evidence, if needed, that Mr Fraser, given his actions overall, was not able to be rehabilitated to the company's satisfaction, as trust and confidence had been lost. In this regard, while Mr Fraser was to some degree provoked by Mr Turner's prior threats, this provocation did not extend to Ms Anderson, who he knew was running the meeting and was a key part of The Good Guys senior management. Thus Mr Fraser would have been better served by concentrating on assuaging his employer's concerns rather than aggravating them.

[41] Therefore, while this dismissal was far from perfect, the Authority can not substitute its judgment for that of the employer, where it was open, on the evidence, for a fair and reasonable employer to conclude that serious misconduct leading to summary dismissal was warranted.

[42] I therefore dismiss the claim for unjustified dismissal, but order the respondent, The Good Guys Group Limited, to pay to the applicant, Mr Darcy Fraser, the sum of \$7500 without deduction, for duress.

Costs

[43] Costs are reserved.

G J Wood
Member of the Employment Relations Authority