

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

[2011] NZERA Auckland 496  
5319715

BETWEEN                    GRAHAM FRENCH  
   Applicant  
  
AND                            FLAVORJEN LIMITED  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:             Angela French, Advocate for Applicant  
   Garry Pollak, Counsel for Respondents  
  
Investigation Meeting:      12 July 2011  
  
Submissions Received:      11 August 2011 from Applicant  
   26 July and 2 September 2011 from Respondent  
  
Determination:                16 November 2011

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**DETERMINATION OF THE AUTHORITY**

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[1]     The applicant, Mr Graham French, says he has been unjustifiably dismissed by the respondent, Flavorjen Limited (“Flavorjen” or “the company”) on 4 June 2010.

[2]     Mr French commenced employment in January 2008 as Account/Sales Manager. The package included the personal use of a vehicle. The employment agreement provided that the employer would meet all maintenance, insurance and running costs. The employee was to pay for petrol for personal use and to use the car to tow his boat. The agreement also provided that Mr French was to keep a record of work and non- work mileage and provide it to the employer upon request.

[3]     Termination of employment was by three months’ written notice. If termination was for serious misconduct it could be by way of summary dismissal.

**Dismissal**

[4]     Mr French said Mr Paul Marra approached him on 4 June 2010 and asked for a quick meeting. He had a typed letter, a blank piece of paper and a pen in his hand.

Mr French said he had a customer and was about to begin a presentation. Mr Marra said they would talk after the customer left.

[5] About 2.30 they had a meeting. Mr French said Mr Marra gave him a letter terminating his employment with immediate effect.

[6] The letter reads:

*This is to inform you that Flavorjen Ltd is terminating your employment immediately today the 4<sup>th</sup> June 2010.*

*The reason for this is based on your Sales performance with the Company in your role as Sales Manager over the last two years.*

*Over the last two years you have failed to accrue sales as expected when you were appointed. These sales do not cover your costs in terms of salary and work related costs. Several targets were put in front of you with your agreement that did not come to fruition.*

*Your sales performance has been far from satisfactory and is not commensurate with an expected performance of a Sales Manager on the generous salary that you are being paid by the Company.*

*The recent budget round shows no improvement and is far from expectation. Despite several iterations to identify where those shortfalls could be made up this is still unsatisfactory. This says your sales performance will be no better than last year and that is unacceptable.*

*I draw your attention to the signed contract you have in terms of confidentiality, any discussion of Flavorjen business with customers is unauthorized and in breach of that agreement.*

*You are to leave all Company property at the office, keys, car, cell phone, laptop, fuel card etc.*

*I am happy to provide a statement of service if you wish and your outstanding salary will be paid net week.*

[7] He asked Mr Marra to explain in more detail but he refused to elaborate. Mr French asked why he was not being given three months' notice as per his contract. Mr Marra said as it was a performance issue he did not need to and did not have to pay anything as it was an immediate dismissal.

[8] Mr Marra asked him to leave immediately and said he would pay for a taxi. Mr French said he had personal items in the car and it was agreed the car would be returned on the Tuesday after the long weekend.

[9] As Mr French was tidying his desk he said he believed Mr Marra was trying to get rid of him because of his medical condition. Mr Marra just told him to reread the letter as it was all in the letter.

### **Reasons for Dismissal**

[10] The letter of dismissal states that lack of performance is the reason for the dismissal. Mr Marra subsequently tried to raise additional reasons. This included Mr French's behaviour, his relationship with Mr Marra and an employee in the Australian office, his use of the car and the filling in of the vehicle log.

[11] These latter reasons are later additions and I do not propose to consider them.

[12] In relation to performance, Mr Marra claimed he had emailed a document dated 11 July regarding progress and setting out target sales and suggesting they meet every Friday to review the last week and plan for the following week. Mr French said he had not seen this document before the proceedings. Mr Marra then said he was not sure if he had in fact emailed it. I accept Mr French's evidence that he had not seen the document.

[13] There was scant and inadequate evidence regarding the criteria for acceptable performance and what steps had been taken in regard to that.

### **Post Dismissal**

[14] On 8 June Mr Marra sent a letter for final pay and holiday pay which stated "*On acceptance of the attached cheque you agree this amount is full and final settlement of your employment with Flavorjen Limited.*" As these were Mr French's legal entitlements, which should have been paid on the date of dismissal, it was inappropriate for Mr Marra to attempt to make them part of a settlement.

[15] On 8 June Mr French returned the car as agreed. Mr Marra asked if Mr French had thought about whether he would like the dismissal handled as a resignation. Mr French said he could tell customers whatever he pleased. Mr Marra then put a letter and a cheque on the table. Mr French said it was incorrect as there was no notice payment. Mr French did not accept the cheque. The money was later deposited into his bank account. Mr French told Mr Marra he was intending to pursue a personal grievance.

[16] On 17 January 2011 Mr French received an invoice for \$3,405.15 from Mr Mara. This related to a contract for the lease of the car used by Mr French. It appears the company had breached the mileage constraints and Mr Marra wanted Mr French to make the payments. This was a matter between Flavorjen and the leasing company.

### **Justification**

[17] The reason for the dismissal is that set out in the dismissal letter: it is an alleged lack of performance. Generally, performance issues will not constitute serious misconduct. While there were discussions about sales Mr French received no formal warnings. Prior to the meeting on 4 June Mr French was given no notice and no opportunity to bring a representative. The dismissal was clearly predetermined. Mr Marra says he gave Mr French the option of having it treated as a resignation. Mr French disputes that happened on 4 June. Regardless, it is clear that Mr Marra had decided, prior to the meeting, that Mr French's employment was to end.

[18] The dismissal was unjustified.

### **Remedies**

[19] Mr French sought lost income for a period of 13 months. He had surgery and was unable to work for a period after the termination of his employment, finally obtaining employment on July 2011 with a \$20,000 reduction in salary. As Mr French was unable to obtain employment due to his illness I am unable to order reimbursement.

[20] While it is difficult to separate and distinguish the effects of the dismissal from the anxiety and stress suffered as a result of Mr French's illness, I accept that Mr French was distressed by the manner in which his dismissal was effected. The respondent is to pay Mr French the sum of \$5,000 pursuant to s 123 (1) (c) (i).

[21] The respondent is to pay Mr French three months' notice in accordance with clause 14.1 (i) of the employment agreement. It is also to pay him the half day's wages for 4 June 2010.

[22] I accept that Mr Marra was dissatisfied with Mr French's performance. The evidence falls short of providing me with sufficient information to be able to conclude that Mr French's actions contributed to the situation that gave rise to the personal grievance. There is to be no reduction in the remedies.

### **Costs**

[23] If the parties are unable to agree on the issue of costs the applicant should file a memorandum regarding costs within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority