



- (ii) Whether the Respondent's written warning for misconduct – following allegations the Applicant had been aggressive and unprofessional in his dealings with office staff – was justified and fairly given; and
- (iii) Whether the Respondent fairly concluded that the Applicant sending to his personal email address a number of company documents marked confidential was a breach of his duty of trust and confidence amounting to serious misconduct and justifying his dismissal; and
- (iv) if any grievance is established, what remedies are due to the Applicant after considering whether he did enough to mitigate any losses and allowing for any blameworthy conduct by the Applicant which contributed to the situation giving rise to that grievance.

### **The investigation**

[4] For the investigation I had written witness statements from the Applicant, his wife Deborah Gipson, his former counsel Rodger Pool, the Respondent's Regional Manager Ruth Boyes, the Respondent's Merchant Services Manager Brian McGinn, the Respondent's Managing Director Ben Johnson and two administrative staff members, Bianca Williams and Michelle Ritchie.

[5] At the investigation meeting I heard further oral evidence, under oath, from the Applicant, Mrs Gipson, Ms Boyes and Mr McGinn. The parties' representatives asked additional questions and provided oral closing submissions.

### **Findings**

#### *The employment relationship*

[6] The Applicant was employed by the Respondent as a merchant service manager on 11 September 2006. The position was a sales role signing up restaurants to participate in a discount voucher scheme published as an entertainment guide ("the book").

[7] Presently aged in his forties, the Applicant had previously worked in management roles in restaurants over 25 years. He had some previous sales

experience in 1988 and had served in the United States Navy some time prior to migrating to New Zealand in 1992, working again in the United States between 1999 and 2006, and returning to New Zealand in 2006. He worked as manager of a North Shore restaurant immediately prior to starting work for the Respondent.

[8] He was employed under the terms of a written employment agreement. It provided a base salary and a commission on each contract signed with a merchant to participate in the book.

[9] The Respondent is the New Zealand arm of an Australian operation producing a similar product across the Tasman.

[10] It has eight Auckland-based employees working from its central Auckland office. At the time of the Applicant's employment this included six account managers and two administrative staff. Their managers were Ms Boyes and Mr McGinn.

[11] The Applicant's role included signing-up restaurants to be part of "the book", training restaurant staff in how to deal with customers using vouchers from the book and promoting the book to organisations who would sell it. During the period of his employment, from 11 September 2006 to 21 December 2006, the emphasis was on getting sign-ups from merchants for the next edition of the book.

#### *Performance issues*

[12] Prior to his appointment the Applicant was told by Ms Boyes and Mr McGinn that he would receive full training and ongoing coaching and support.

[13] Before starting work he was provided with a sales script to learn. A week after he began work he was part of a group from the company that attended a week-long training conference in Australia.

[14] The Applicant complains that he had inadequate training and support in the first week which is contrary to the evidence of Ms Boyes and Mr McGinn. Their evidence details workshop sessions on various parts of the work, individual 'role play'

sessions with the Applicant and some client visits where the Applicant accompanied Mr McGinn.

[15] In an email to other staff shortly after returning from the conference the Applicant himself described his week-long course as “*very productive*” and his feedback forms describe various sessions as “*very constructive*”, “*thorough*” and “*fanbloodytastic*”.

[16] In the following weeks Ms Boyes became dissatisfied with the level of sign-ups made by the Applicant. He has turned down an offer for what she called “*double teaming on sales calls*” where she or Mr McGinn would accompany the Applicant doing presentations to merchants.

[17] Throughout October Ms Boyes had weekly meetings with the Applicant about his sales work, conducted a further role play and identified target clients. She also took the Applicant to a client meeting so he could observe her presentation technique.

[18] In early November Mr McGinn told Ms Boyes that he was concerned about the Applicant’s ability to work with the sales script. Ms Boyes continued to have weekly meetings with the Applicant discussing target clients and reinforcing goals.

[19] On 23 November she accompanied the Applicant to a meeting with a potential ‘sign up’, a Japanese restaurant. While English was not the restaurant manager’s first language, Ms Boyes was concerned at the Applicant’s failure to follow the step-by-step sales presentation. She took over the presentation.

[20] Sales results to late November showed the Applicant was the only one of six sales staff who had not met his sales goals. All others had exceeded targets by at least 150 per cent. The Applicant had achieved less than 70 per cent.

[21] Ms Boyes raised her concerns with the Applicant during their weekly meeting on 28 November. She told him that they needed to work out a plan to improve his performance and referred to looking at these issues in his 90-day performance review, a standard appraisal completed with all staff nearing the end of a 90 day “probationary

period” provided in their employment agreement. He responded by complaining about poor communication with the two office staff and a lack of support from Mr McGinn.

[22] The following day Ms Boyes sent the Applicant a “*Performance Improvement Plan*” and invited him to a role playing assessment two days later. The plan noted concerns with the Applicant’s ability to present the script and the “*quantity and quality of merchant signs*”. Future requirements were identified as review of the script, attending a role play on 1 December and providing support to the Applicant, including “*double team*” work with Mr McGinn.

[23] By telephone the next day the Applicant told Ms Boyes that he was under a lot of pressure as he was moving house and often up late calling the USA for news of his mother who lived there and was unwell.

[24] On 1 December the Applicant left a message at the office saying he going to the doctor and did not arrive at the appointed time for the role play workshop. Ms Boyes responded with a mobile voice message saying the Applicant could postpone the workshop. The Applicant arrived at work shortly after and told Ms Boyes he had been diagnosed with stress related high blood pressure and anxiety attacks.

[25] By email later that day Ms Boyes confirmed that the workshop was postponed and asked for more information about the Applicant’s diagnosis. She asks whether this was “*due to circumstances at work, relating to us bringing to your attention those areas of your performance that we need to continue to coach and develop you on*”. She assured the Applicant that she would take any necessary steps to address any concerns “*if your sickness is relating to anything at work*”.

[26] The following week the Applicant met with Ms Boyes and told her he was taking anti-depressant medication but also had a stomach parasite. He described his illness as not solely due to work pressures but also worries about his sick mother and moving house.

[27] The training session was rescheduled to 13 December to allow the Applicant time to prepare.

[28] On 8 December the Applicant met with the Respondent's Australian-based general manager, Heidi Halson, who was visiting Auckland. The meeting was suggested by Ms Boyes who encouraged the Applicant to outline his concerns to Ms Halson.

[29] Following that meeting Ms Halson gave the Applicant a letter – after checking its contents with Ms Boyes – telling him that reasons he gave for performance problems were not a suitable explanation. It noted that he believed he had not received sufficient training. It stated that the Applicant's probationary period would be extended for a further three months, until 11 March 2007. The letter included these two statements:

*... [A]lthough you have received the same training as some better performing staff members, we are prepared to give you additional time and training to improve to a standard that is acceptable to us.*

*...*

*This will allow us time to provide you additional training, allow you time for improvement and allow us time to further assess your performance.*

[30] At the 13 December workshop the Applicant confirmed that he did not need further time for preparation and described his health as good. He then gave a presentation which Ms Boyes assessed as inadequate. It did not cover all the steps in the four page script, included material not in the script and made inaccurate references. She identified a number of improvements needed.

[31] An hour after than meeting the Applicant made a complaint about one of the office staff and how she handled files that he was dealing with. Ms Boyes later interviewed the office worker who made her own complaint about the Applicant's treatment of her.

[32] On 14 December Ms Boyes met with the Applicant and gave him a letter outlining the issues of concern with his performance and raising a serious misconduct allegation of verbal bullying of one of the office staff.

[33] The letter advised of arrangements for the disciplinary meeting, the right to bring a support person or representative, and offered paid leave through to the meeting four days later.

[34] Further detail of what happened at disciplinary meetings on 18 and 21 December are discussed later in this determination. In discussion on performance issues the parties covered many of the facts and their views on them as set out above.

[35] I am satisfied from the evidence that the Applicant was given adequate opportunity to perform adequately and had sufficient training and support to do so. It follows that the Respondent was entitled to raise its concerns with him about his actual performance and I find it did so in a fair way. After hearing from the Applicant and his representative, it reached the conclusion that a written warning regarding performance was necessary.

[36] Against the background of poor comparative sales and steps taken to further assess and train the Applicant, this was, I find, a course of action open to a fair and reasonable employer in all the circumstances at the time. It was a justified warning.

*Conflict with other staff*

[37] The Applicant has complained on a number of occasions to Ms Boyes and Mr McGinn about the two administrative staff (“B” and “M”) being rude and uncooperative. He was concerned that processing of paper work for sales he had made was delayed or subject to closer scrutiny for “discrepancies” than those of other sales staff.

[38] In one documented example the Applicant had asked Ms Boyes to speak to M about her manner in speaking to him but asked a few days later that she “hold off”.

[39] These complaints resurfaced on 13 December following Ms Boyes’ assessment of the Applicant’s role play presentation. The Applicant complained that M had talked down to him in an unprofessional tone of voice when he had asked for some files.

[40] While away from the office on business Ms Boyes made her initial inquiries about this complaint by telephone. M responded with tearful accusations of her own about the Applicant’s manner towards her.

[41] Ms Boyes also spoke to two other sales representatives who had witnessed the conversation about which the Applicant complained. One confirmed M's account describing the Applicant as "really rude" to M. The other agreed the conversation was heated but "*did not seem to be a big deal*".

[42] Ms Boyes' put her assessment of the situation this way in her witness statement:

*It seemed to me that what had occurred was that Andre was angry at the feedback I had given him during the role play and took it out on [M]. It appeared that Andre had initiated the heated discussion with [M] and had then come to me saying it was [M]'s fault.*

[43] She concluded that the Applicant's version "*may not be truthful*".

[44] The respective allegations – from the Applicant of rudeness and deliberate undermining of his work by B and M and from the two office staff of overbearing behaviour – were canvassed extensively in discussion during the 18 December disciplinary meeting.

[45] This was against the background of a conclusion expressed in Ms Boyes letter of 14 December calling the Applicant to that meeting:

*Your verbally offensive and hostile manner towards some of our female staff is unacceptable and it raises trust and confidence issues.*

[46] Having heard her evidence about the conversations and inquiries relied upon it is difficult to accept this as the conclusion that a fair and reasonable employer would have reached in the same exercise without first hearing from the Applicant.

[47] Ms Boyes appears to have given little weight to how both M and B may have contributed to poor office relations with the Applicant. She readily identified the prospect that the Applicant had made complaints about M and B to deflect attention from his own performance. She does not appear to have considered that M and B made complaints about the Applicant to deflect attention from their own conduct or performance, although her evidence was that she had found it necessary to "*verbally counsel*" B about her performance in processing paper work.

[48] On the balance of probabilities I find that the Respondent unduly magnified the issue of office relationships because of underlying concerns about the Applicant's poor performance. Against a background of a superficial and undocumented inquiry and the firm conclusion expressed in the 14 December letter, I find that a fair and reasonable employer would not have come to the conclusion that the behavioural complaints were solely the fault of the Applicant to the extent that a final written warning was warranted. It was unjustified.

*Transferring confidential documents*

[49] While the Respondent was considering its decision on disciplinary action regarding performance and office conduct, a further issue arose: was the Applicant entitled to remotely access the Respondent's computer system while he was on paid leave and preparing to attend the 18 December disciplinary meeting and send to his personal email address some 45 emails? Among those emails were 7 or 8 that were regional management meeting agendas. These agendas included or attached business details which the Respondent considered to be "*highly confidential and commercially sensitive*".

[50] The Respondent concluded this amounted to "*deliberately removing highly confidential intellectual material without a legitimate reason*". It decided this was a breach of trust, confidence and contractual obligations amounting to serious misconduct and dismissed the Applicant for it.

[51] The evidence confirms that the 18 December disciplinary meeting became a heated exchange of views between Ms Boyes and Mr McGinn and the Applicant and his counsel at the time, Mr Pool.

[52] Mr Pool's written statement describes the meeting in this way:

*... [T] he company's managers often disagreed with Andre and interrupted him to say so. On several occasions the meeting became argumentative and I had to intervene to request that Andre be allowed to have his say without interruption.*

[53] Ms Boyes, for her part, gave evidence of what she regarded as an "*argumentative*" and "*inflammatory*" approach from the Applicant and Mr Pool.

[54] The next day Ms Boyes prepared her decision on the disciplinary issues. She decided – she says in her evidence – that she “*was prepared to give Andre another go to try and resolve things*” and had drafted a letter giving the Applicant “*a warning for his performance and a final warning for his behaviour in the office with other staff*”.

[55] That evening she checked the Applicant’s work email address. He remained on paid leave and she wanted to see if there were any emails from merchants that needed to be actioned. In the course of that exercise she found that the Applicant had used remote access between 16 and 18 December to send the emails, including some attaching the agendas with the Respondent’s financial and performance information.

[56] On 20 December the Applicant was invited to a further disciplinary meeting. Ms Boyes’ email invitation said the agendas contained the confidential information and were required to be shredded after each meeting. She said the Respondent viewed the Applicant’s actions as “*a theft*” and were “*very concerned that [he] may have shared these documents with other people outside of the company*”.

[57] The Applicant’s actions were described as a breach of the Respondent’s internet policy and breaching the confidentiality clause of his employment agreement amounting to serious misconduct. The Applicant was directed to provide a statutory declaration affirming that he had deleted those files, not saved the files on any other memory device, and not shown them to anyone who did not work for the company.

[58] He was warned that the disciplinary meeting could result in his “*immediate dismissal for theft, serious misconduct and breach of confidentiality*”.

[59] Mr Pool responded that day with an explanation that the Applicant had needed to access records for the “*sole purpose*” of preparing his response for the 18 December disciplinary meeting. He advised that the Applicant had not used confidential information for any other purpose and would make the requested statutory declaration “*at the conclusion of this process*”.

[60] At the disciplinary meeting the following morning Ms Boyes challenged the Applicant as to whether the extent of information contained in the documents he had

sent to his home email address was necessary to address issues regarding his situation. The information included sales goals, turnover and staff performance for Australia.

[61] The Applicant's evidence was that he had not been able to access that information on his home computer in any event. He had wanted the documents for the information they had about the performance of himself and other Auckland staff in order to address the performance issues raised with him.

[62] I find that a fair and reasonable employer would not have concluded that remote access was serious misconduct in all the circumstances. I do so for these reasons:

- (i) the Respondent's internet policy allowed for access "*for the purposes of conducting Company-related business*". The Applicant remained employed and preparing for his disciplinary meeting was company-related business – he was in fact on paid leave for the purpose of doing so. The allegation that possession of the documents through his normal, enabled remote access was "*theft*" and "*without a legitimate reason*" was, on its face, inaccurate.
- (ii) While the meeting agendas, containing the Respondent's business information, were marked confidential and to be shredded after use, the Applicant gave evidence, accepted by Ms Boyes, that she and others routinely kept those documents for use in branch meetings before shredding them.
- (iii) There was no real basis for the suggestion that the Applicant had shown any of the documents to anyone else. While there was always a risk, there was no evidence of any actual breach of confidentiality obligations.
- (iv) The Applicant had undertaken to provide the statutory declaration requested. While the situation was not helped by Mr Pool's suggestion that this would not be done immediately but only once the "*process*" was complete, the Applicant was willing to provide the assurances that the Respondent had indicated would be satisfactory.

[63] The Respondent had already resolved to allow the Applicant a further three months to reach its performance standards – as explained in Ms Halsom's letter of 8

December. Ms Boyes had, she says, decided by 19 December that warnings would be enough. The subsequent dismissal was a heated overreaction.

[64] A fair and reasonable employer – investigating performance and staff relationship issues and having already concluded that warnings would be sufficient disciplinary action – would have exercised more caution, perhaps even allowing itself a ‘cooling off’ period, before considering taking the extreme step of dismissal. In all the circumstances, the decision taken in the present case was unjustified.

### **Determination**

[65] Having found that the performance warning was justified but the final writing warning regarding conduct and the dismissal over accessing his emails were both unjustified, the Applicant has a grievance that requires remedies.

### **Remedies**

#### *Lost wages*

[66] The Applicant seeks lost wages for the period between 21 December 2006 and 13 August 2007 when he began a new job.

[67] I accept the Applicant’s evidence that the anxiety attacks he had begun experiencing made it difficult to seek a new job. However his evidence was that he “*began to regain control over the anxiety and stress within a month or so of being dismissed*”.

[68] His evidence on his subsequent job search was sketchy and I find demonstrates a failure to adequately mitigate his loss. The Applicant had extensive experience and skills in the restaurant industry. While he was entitled to pursue a new permanent position at the salary level he considered suitable, he took no interim or temporary work in the period between February and August 2007 and he had no earnings. I accept the Respondent’s submission that this was unsatisfactory during a period of relative economic buoyancy and a shortage of experienced hospitality

industry staff. I do not consider the Respondent should meet the cost of lost wages for the full period in light of insufficient measures by the Applicant to mitigate his loss.

[69] Lost wages are awarded for a three month period only under s123(1)(b) and s128 of the Employment Relations Act 2000 (“the Act”).

[70] The earnings level at which lost wages might be awarded was in dispute between parties. I accept Ms Boyes evidence that lost wages should be calculated at \$63,000 as the most the Applicant could have earned. In light of the performance problems I accept existed, the Applicant cannot succeed in a claim based on earning the maximum commission that he might otherwise have received.

*Compensation under s123(1)(c)(i) of the Act*

[71] The Applicant’s evidence was that he was humiliated and distressed by the termination of his employment after only little more than three months.

[72] The Respondent was aware before dismissing the Applicant that he was suffering some stress-related illness and anxiety attacks that were, at least in part, said to be related to his inability to reach satisfactory work standards. Even if it believed that illness was solely the result of external factors, it was aware of at least a vulnerability of the Applicant which would heighten the sense of humiliation he experienced as a result of his dismissal.

[73] In these circumstances, and having regard to the general range of awards in case of this type, the Applicant is awarded \$6000 in compensation for the humiliation, loss of dignity and injury to feelings occasioned by the Respondent’s unjustified actions.

*Contribution*

[74] The remedies awarded to the Applicant are to be reduced by one-third because of the extent to which his own actions contributed to the situation giving right to his personal grievance. This reduction is made under s124 of the Act for the following reasons.

[75] This grievance arises from a situation where an attempt to address performance issues ‘spiralled out of control’. Throughout the Applicant has given no satisfactory explanation for his problems with memorising and performing the sales script and has not acknowledged any personal responsibility for not meeting work standards other staff exceeded. He adamantly rejects the notion that he has any learning difficulties. Rather his evidence was that the script and sales requirements were very similar to a previous sales job he had.

[76] Similarly his approach to return and deletion of the emails contributed to the overheated atmosphere in which he was dismissed on 21 December. Having accessed the information, he could have defused the situation by returning the material and signing the statutory declaration that there were no copies made or material shown to others, without compromising his position in disputing the Respondent’s allegations.

[77] An issue arose late in the investigation about whether allegedly inadequate paperwork prepared by the Applicant during his employment, but discovered only after his dismissal, could be taken into account as a factor in contribution. This paperwork was not among the documents in evidence and by agreement with the parties, that allegation was pursued within my investigation.

### **Costs**

[78] The parties are encouraged to resolve any matter of costs between themselves. If they are unable to do so, the Authority will determine the matter on application by either party within 28 days of the date of this determination. The other party will have 14 days to reply to an application on costs.

### **Summary**

[79] The Respondent’s actions in giving the Applicant a written warning for poor performance were justified.

[80] The Respondent’s actions in giving the Applicant a final written warning regarding his dealings with office staff were unjustified.

[81] The Respondent's actions in dismissing the Applicant for serious misconduct were unjustified.

[82] The Applicant is entitled to the following remedies, after allowing a one-third reduction for his contribution to the situation giving rise to his personal grievance.

- (i) two months lost wages calculated on the basis of deemed total earnings of \$63,000 a year; and
- (ii) \$4000 compensation under s123(1)(c)(i) of the Act.

[83] If costs cannot be resolved between the parties, they may apply to the Authority for costs to be determined.

Robin Arthur  
Member of the Employment Relations Authority