

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 195
5419203

BETWEEN LAMAR ROBERT ANDREW
 HARGREAVES
 Applicant

A N D HAVEN INSURANCE LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S Houliston, Counsel for Applicant
 J Farquhar and C Baldwin, Advocates for Respondent

Investigation Meeting: 27 March 2014 at Auckland

Submissions Received: 11 April 2014 for Respondent
 17 April 2014 for Applicant

Date of Determination: 19 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Lamar Hargreaves, says he was unjustifiably dismissed on 18 March 2013. Mr Hargreaves asks the Authority to find that he has a personal grievance and award him reimbursement of lost wages and compensation.

[2] The respondent, Haven Insurance Limited (HIL) acknowledges that Mr Hargreaves was dismissed on 18 March 2013 but says that the dismissal was justifiable on the grounds that Mr Hargreaves would not perform some of the duties that were fundamental to his position.

Background

[3] Mr Hargreaves commenced his employment with HIL on 25 February 2013. An employment agreement was signed on 5 February 2013 and while it is silent on the title of Mr Hargreaves' role, his evidence is that he was employed as an operations manager and it is commonly accepted that Mr Hargreaves was employed to: recruit, train and manage a team of marketers who would "generate telemarketing leads for insurance and accounting advisers and promote and sell insurance directly over the phone".¹

[4] The duties and responsibilities for Mr Hargreaves also included: "any other duties and responsibilities reasonably requested to be undertaken by the employer relevant to the position generally".

[5] The evidence is that before Mr Hargreaves commenced his employment, he met with Mr Craig Baldwin, and his brother, Geoffrey Baldwin,² and gave a presentation regarding what would be required to get the newly proposed call centre for HIL operational; including obtaining office equipment and employing staff.

[6] Before commencing his employment on 25 February 2013, Mr Hargreaves interviewed telemarketing staff for the newly formed HIL Auckland Call Centre and employed three people.

Objection to "cold calling"

[7] The evidence of Mr Hargreaves is that on the first day of his employment with HIL he sat with another employee (G) whom, apparently, was an adviser for HIL. Mr Hargreaves listened to this person make "cold calls".³

[8] Mr Hargreaves says that after about an hour of working with G he provided him with some comments about the cold calling process. Mr Hargreaves was then asked by G to carry out some cold calls. He says that he was a little taken aback that he was asked to make cold calls, but for training purposes, he did so to demonstrate his technique.

¹ Schedule A of the employment agreement – duties and responsibilities

² Geoffrey Baldwin is the manager at HIL. His brother Craig is the sole director of the company

³ Cold calling is a process whereby telemarketers phone people, selected at random, and ascertain their interest in making an appointment to discuss insurance and finance.

[9] Mr Hargreaves had a meeting with Geoffrey and Craig Baldwin (the Baldwins) at the end of his first day of employment. Mr Hargreaves says that he advised the Baldwins that he was concerned that he had been asked to carry out cold calling (telemarketing) as this was not a part of his job description and he had not been told that he would have to do this “routinely” in his role as operations manager. Mr Hargreaves attests that he was “reassured” by Geoffrey Baldwin that from time to time he would be required to make cold calls, but only until such time as the telemarketing team was up to its full strength of six full-time staff.

[10] The first of the telemarketers started with HIL on 27 February 2013. Mr Hargreaves conducted some training.

[11] On 28 February 2013 Mr Hargreaves was advised by Geoffrey Baldwin that HIL were going to fly him down to the company’s call centre at Nelson, for the purpose of allowing Mr Hargreaves to obtain some knowledge as to how an established call centre operates, and to obtain some training from the senior call centre manager, who had been successfully running the Nelson call centre for more than three years.

[12] The evidence of Mr Hargreaves is that on 29 February 2013, he became ill with the flu and he advised Geoffrey Baldwin that he would be unable to attend work that day.

[13] Mr Hargreaves visited the Nelson call centre on 4 March 2013, as planned. He met with the call centre manager, Ms Eloise Martyn. He says that he was surprised when informed by Ms Martyn that a large part of her role was cold calling and making appointments for the HIL financial/insurance advisers. While at the Nelson call centre, Mr Hargreaves carried out some cold calling.

[14] Mr Hargreaves returned to Auckland but was sick again on 5 and 6 March 2013.

Meeting 7 March 2013

[15] Mr Hargreaves met with the Baldwins. A comparison of the evidence of Mr Hargreaves with that of the Baldwins suggests that the parties may have had a different perspective of the purpose of this meeting. The Baldwins refer to a “review”

meeting for the purpose of discussing with Mr Hargreaves his management of the call centre team, consisting then of three people, plus Mr Hargreaves.

[16] The evidence of Craig Baldwin is that due to the absence of Mr Hargreaves because of sickness, the call centre staff had primarily been trained by other people. Craig Baldwin says that it was emphasised to Mr Hargreaves that he was required to work an evening shift on at least two days each week, and he was required to make cold calls whilst building up the call centre team.

[17] The evidence of Mr Hargreaves pertaining to the meeting is that there was some discussion about his visit to the Nelson call centre and he expressed a view that the resources there could be used more efficiently. Mr Hargreaves says that the substance of the meeting, however, was about him carrying out cold calling.

[18] The common evidence is that Mr Hargreaves was concerned about having to carry out cold calling as he understood that he had been employed as the operations manager for the new Auckland call centre. Mr Hargreaves believed that his focus needed to be on management tasks; such as recruitment and management of the call centre staff.

[19] Mr Hargreaves makes no mention of the Baldwins' requirement that he work a minimum of two evening shifts each week, but he does refer to Geoffrey Baldwin informing him that HIL required a minimum of sixty appointments to be generated by the telemarketing team each week.

[20] The evidence of Craig Baldwin is that at the conclusion of the meeting on 7 March, a further review meeting was scheduled for 11 March 2013.

Meeting 11 March 2013

[21] The evidence of Mr Hargreaves is that the call centre team had been operating for two weeks. The evidence of Craig Baldwin is that Mr Hargreaves provided the calling statistics for the three staff he had employed but did not include any calling statistics for himself. Craig Baldwin says that when asked to provide his cold call numbers Mr Hargreaves advised that he had not generated any appointments, albeit he informed that he had made calls for 2 to 3 hours per day. Craig Baldwin attests that based on the performance of the Nelson call centre, and the performance of the new

recruits at the Auckland centre, 2 to 3 hours of cold calling should yield at least two confirmed appointments.

[22] Craig Baldwin says that Mr Hargreaves informed that he was “a bit rusty” and had not done any cold calling for a long time.

[23] The further evidence of Craig Baldwin is that Mr Hargreaves was advised that he was making insufficient calls to meet the targets that had been set in regard to generating appointments and that he was required to make cold calls. Mr Hargreaves was also offered some training with the Nelson call centre manager, via telephone.

[24] While Mr Hargreaves makes no mention of it in his written evidence, Craig Baldwin says that Mr Hargreaves informed that he was unable to do any night shifts due to other commitments. At the investigation meeting, Mr Hargreaves told the Authority that he was involved in an insurance industry course of study, but he did not ever tell the Baldwins why he could not, or would not, perform a nightshift for two nights each week.

[25] The evidence of Craig Baldwin is that he expressed concern about the unwillingness of Mr Hargreaves to perform what was considered to be core duties related to his position. This is an apparent reference to Mr Hargreaves not being available to work a nightshift two nights each week and not carrying out enough cold calling.

[26] The evidence of Mr Hargreaves is that Geoffrey Baldwin told him that he was required to carry out cold calling for a period of two or three months. Mr Hargreaves says that he informed Mr Baldwin during the meeting on 11 March 2013 that there had been an earlier discussion about the requirement to perform cold calls “from time to time” for approximately one month. Mr Hargreaves also expressed the view that the position of the Baldwins had changed from the meeting on 7 March where he says he was told that there would be no requirement for cold calling, if he could show he was adding value to the business.

[27] Mr Hargreaves says that he was becoming concerned that his role within the business was not what had been described to him prior to accepting the position.

Meeting 18 March 2013

[28] Mr Hargreaves met again with the Baldwins. He provided a written breakdown of the performance of the telemarketing team for the previous week. Mr Hargreaves says that the figures were “pleasing” because they showed that the team was getting better each day, albeit the target of sixty appointments for potential new clients per week had not been achieved.

[29] Mr Hargreaves acknowledges that his perception of the performance of the team was not shared by Geoffrey Baldwin as he was not happy about the team’s performance at all and advised Mr Hargreaves that if the telemarketing team did not make sixty appointments each week, they would “all be out of a job”.

[30] The evidence of Mr Hargreaves is that Geoffrey Baldwin was “clearly upset” and he stated that he would have to sell his Mercedes vehicle to get the company “out of the hole it was in”.

[31] The evidence of Mr Hargreaves is that he was informed by Craig Baldwin that he was disappointed with the performance of the telemarketing team and he was also disappointed with Mr Hargreaves. Mr Hargreaves attests that he advised the Baldwins that he also was disappointed and upset that he had left a management position to come to HIL and was now, in effect, being asked to do an entry level job as a telemarketer. Mr Hargreaves told the Baldwins that he felt as if he had been misled by them.

[32] The evidence of Craig Baldwin is that questions were asked of Mr Hargreaves regarding the requirement for him to carry out cold calling and to work some nightshifts. Mr Baldwin says that Mr Hargreaves’ position regarding his refusal to work nightshifts remained unchanged. Mr Baldwin says that Mr Hargreaves admitted for the first time, that he was not willing to make any cold calls as it was not his job to do so. Mr Baldwin says that Mr Hargreaves appeared to have the perception that cold calling was a menial task and not consistent with his belief pertaining to the role he had been employed for.

[33] The further evidence of Craig Baldwin is that Mr Hargreaves had disregarded all requests to do a reasonable amount of cold calling and “now flat out refused to do any at all”. Mr Baldwin says that the view of HIL was that the refusal by Mr Hargreaves to carry out cold calling then, or at any time in the future, impacted upon

the ability of Mr Hargreaves to train staff, meet any targets and generally undertake his core duties as a manager. Mr Baldwin expressed the view that Mr Hargreaves was fully aware that cold calling was required until the call centre was generating the appointments target without his input. Mr Baldwin told the Authority that Mr Hargreaves was aware that the requirement for him to make cold calls was not linked to a specific timeframe, but was linked to Mr Hargreaves hiring and training a minimum team of six staff, which would then allow him to take a more management focused role and reduce his cold calling to only training new staff.

[34] The meeting on 18 March 2013 concluded on the understanding that the Baldwins would have some further discussion about the issues that had arisen and a further meeting with Mr Hargreaves would take place later that day.

[35] However, I note that there is an important difference in regard to the evidence of Craig Baldwin as compared with that of Mr Hargreaves as to what could possibly happen later that day. The evidence of Craig Baldwin is that he advised Mr Hargreaves that he would be having a discussion with his brother (Geoffrey) about Mr Hargreaves' unwillingness to carry out core duties and that this could result in the employment of Mr Hargreaves being terminated.

[36] In contrast, Mr Hargreaves says that at the conclusion of the meeting on 18 March he was told that the Baldwins would have some discussion and there would be a further meeting later that day "to see if we could resolve the issue".

[37] Mr Hargreaves attests that:

At no stage during the meeting (or prior) was I told that my employment was in jeopardy or that termination was being considered by Haven.

The dismissal of Mr Hargreaves – 18 March 2013

[38] Later on the day of 18 March 2013, Mr Hargreaves met with Craig Baldwin⁴. The evidence of Mr Baldwin is that he advised Mr Hargreaves that his employment was terminated because of his unwillingness to:

⁴ Geoffrey Baldwin was travelling to Nelson, as evidenced by his Air New Zealand travel information, departing Auckland 12.20pm, Monday 18 March 2013

- (a) Perform core duties;
- (b) Lead from the front by cold calling for both training and performance purposes;
- (c) Attempt to work evening shifts as originally agreed; and
- (d) Change or work on any of the above or any time in the future (as explicitly stated by Lamar in the meeting earlier that day).

[39] The evidence of Mr Hargreaves is that he met later in the day of 18 March with Craig and Geoffrey Baldwin, but clearly this evidence is not correct as it is established that the latter was travelling to Nelson at the time. Mr Hargreaves says that Craig Baldwin stated that HIL had “miscommunicated” the details of the position of operations manager to him. Mr Hargreaves attests that Mr Baldwin suggested to him that perhaps he thought the position was “something else”.

[40] Mr Hargreaves confirms that Mr Baldwin informed him that his employment was terminated.

[41] The termination of Mr Hargreaves’ employment was confirmed by a letter of the same date. There is no mention of any reason for the dismissal and the letter is couched in rather utilitarian terms; thus:

18/03/2013

Lamar Hargreaves
Private and Confidential

RE: Termination of employment contract with Haven Insurance Limited

This is hereby your 2 weeks’ notice that your employment contract will be terminated effective 29 March 2013 as per section 3.2 of your employment agreement. Haven Insurance Limited will use its option of paying salary in lieu of this notice period as per section 12.1 of your employment agreement. You will not be required to come into the office during this period.

Your payment will be made on the 28th March 2013.

(Signed)
Haven Insurance Limited

[42] The reference to section 3.2 of the employment agreement is somewhat out of context and the clause needs to be viewed in full, as set out at para [52] of this determination.

Analysis and conclusions

[43] The question of whether the dismissal of Mr Hargreaves was justifiable must be determined by the Authority on an objective basis by applying the following test: Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.⁵

[44] And in applying the above test, the Authority must consider the following criteria:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.⁶

Was the dismissal of Mr Hargreaves unjustifiable?

[45] On the weight of the evidence before the Authority, I find that the dismissal of Mr Hargreaves was unjustifiable on several fronts. First, I am satisfied that HIL did not inform Mr Hargreaves that his employment was in jeopardy. And it follows that Mr Hargreaves was never given a reasonable opportunity to respond to the employer's concerns before his employment was terminated. While it is accepted that the Baldwins certainly raised their concerns regarding the failure of Mr Hargreaves to carry out a reasonable amount of cold calling, and the refusal by Mr Hargreaves to do some nightshift duties was also raised, at no time was Mr Hargreaves ever informed

⁵ Section 103A(2) Employment Relations Act 2000

⁶ Section 103A(3) Employment Relations Act 2000

that his failure to meet the expectations of the business, in regard to these two particular matters, had resulted in his employment being placed in jeopardy, and he needed to give serious consideration to his stance as dismissal was being contemplated.

[46] It would have been a relatively simple matter for HIL to have drawn Mr Hargreaves' attention to the terms of his employment agreement at clauses 1.1 and 1.2. The former provides that Mr Hargreaves was bound to undertake the duties and responsibilities described in Schedule A of the agreement. The duties and responsibilities at Schedule A are:

- Recruit, train and manage a team of marketers who will:
 - generate telemarketing leads for Insurance & Accounting advisers.
 - promote and sell insurance directly over the phone.
- Any other duties and responsibilities reasonably requested to be undertaken by the employer relevant to the position generally.

[47] It seems to me that while the new call centre was being established, HIL was entitled to require Mr Hargreaves to carry out a reasonable amount of cold calling, and also to expect him to work some nightshifts. I conclude the provision: "any other duties and responsibilities reasonably requested to be undertaken", as set out in Schedule A of the agreement, must surely be seen to allow for this.

[48] Then at clause 1.2 of the agreement:

The employee agrees to accept flexibility of work functions in recognition of the need for the employer to enhance efficiency and its ability to compete in the marketplace.

[49] Again, it seems to me that HIL should have drawn Mr Hargreaves' attention to this term of his employment agreement and his obligation to: "accept flexibility of work functions" in recognition of a need for the company to enhance its efficiency and its ability to compete in the marketplace.

[50] But then, HIL also had an obligation to draw to the attention of Mr Hargreaves the aspects of his performance that the company was dissatisfied with and the action required by him. It is well established that where an employee may potentially be dismissed for poor performance, they must be given specific reasons for the dissatisfaction and reasonably specific and measurable improvement criteria should be

established by the employer, as well as giving a reasonable period to establish whether the employee is able to achieve the improvement sought.⁷

[51] While it is accepted that the Baldwins did enter into some discussions with Mr Hargreaves and expressed their concerns, unfortunately there was a significant deficiency in regard to taking the appropriate steps to allow him to rectify the situation, as required by the express criteria set out in *Trotter*.

[52] Last, but most certainly not least, the dismissal of Mr Hargreaves was unjustified because it was substantially in breach of clause 3 of the employment agreement. This states that;

3. **REVIEW**

3.1 A review period will apply for the first 3 months of employment for both parties to assess the suitability of the position for the needs of each party. The employer will provide guidance, feedback and any necessary support to the employee and the employee will provide feedback to the employer regarding the position. Both parties will act in good faith with each other, promptly discuss any difficulties that arise, and the employer [*and the employee*] will appropriately advise each other if either party believes that the employment will terminate on the expiry of the 3 month period.⁸

3.2 If either party expects that the employment will be terminated at the end of the 3 month period, the employment may be terminated by providing 2 weeks notice.

[53] It goes without saying that this provision imposed a review period, for both parties, whereby for HIL there was a period of three months available to assess the suitability of Mr Hargreaves for the position that he was employed for. HIL had an obligation to “provide guidance, feedback and any necessary support” to Mr Hargreaves, and both parties were required to discuss any difficulties that arise.

[54] While it is arguable whether HIL provided reasonable support to Mr Hargreaves, there was some guidance and feedback provided to him. However, having agreed to a review period of three months, HIL had a contractual obligation to observe this period and assess Mr Hargreaves’ suitability for the position and if,

⁷ *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659

⁸ The Authority has inserted the words enclosed between the brackets as they have (apparently) been mistakenly excluded in the drafting of the clause.

having found that he was unsuitable; he was entitled to be advised that his employment would not continue upon the expiry of the three month period.

[55] And of course, there were certain obligations imposed upon Mr Hargreaves under the terms of the employment agreement. I will return to these in regard to awarding appropriate remedies.

[56] In summary, as set out above, because the dismissal of Mr Hargreaves was unjustifiable for several reasons, he has a personal grievance for which remedies are available.

Remedies

Reimbursement of lost wages

[57] Mr Hargreaves promptly obtained new employment and hence he incurred a loss of income for only two weeks. As it is obvious that Mr Hargreaves promptly mitigated his loss, he is entitled to reimbursement of two weeks wages. It appears to be accepted that the gross sum involved is \$2,500. However, HIL says that Mr Hargreaves was paid sick leave for 3 days (\$750) and because of his short period of service (less than 6 months) he was not entitled to paid sick leave. Therefore, this amount should be off-set against any award of lost remuneration. But this was never raised with Mr Hargreaves during his employment in the manner required by the Wages Protection Act 1983 and it is now not appropriate for the Authority to revisit this matter.

Compensation

[58] Mr Hargreaves seeks an award of distress compensation in the sum of \$10,000. His evidence is that on the day of the termination of his employment he was required to leave the office immediately without the opportunity to explain his circumstances or say farewell to the staff that he had recently recruited.

[59] Mr Hargreaves says that the abrupt nature of the dismissal was “very distressing” particularly going from earning a good salary to having no income so suddenly. On the other hand, Mr Hargreaves promptly obtained new employment and only lost two weeks income, and he had only been employed by HIL for a very short period.

[60] Then under s.124 of the Employment Relations Act 2000 (the Act), when deciding the nature and extent of the remedies to be provided, the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. And if those actions so require, the Authority may reduce any remedies that otherwise might have been awarded.

[61] I conclude that the actions of Mr Hargreaves were of such a blameworthy nature that a reduction in the remedy of distress compensation is warranted. This is because the requests by HIL for Mr Hargreaves to do a reasonable amount of cold calling to create appointments, and for him to work some evenings, were quite reasonable in the circumstances, as a new call centre had to be established and become an efficient operation as quickly as possible; given the reasonably substantial investment made by HIL.

[62] Taking into account all of the circumstances, I conclude that an award of distress compensation in the sum of \$5,000 is appropriate.

Determination

[63] For the reasons set out above, I find that the dismissal of Mr Hargreaves was unjustifiable.

[64] Pursuant to ss.123 and 128 of the Act, Haven Insurance Limited is ordered to pay to Mr Hargreaves a gross sum equivalent to two weeks salary; being \$2,500.00.

[65] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Haven Insurance Limited is ordered to pay to Mr Hargreaves the sum of \$5,000.00.

[66] Mr Hargreaves has also asked for penalties to be awarded for the breach of clause 3 of the employment agreement and the good faith provisions of s.4 of the Act. But given my findings in regard to the respective obligations of both parties under the terms of the employment agreement, I conclude that it is not appropriate to make any award of penalties.

Costs

[67] Costs are reserved. The parties are invited to resolve the matter if they can, taking into account the daily tariff approach of the Authority and that the investigation meeting took half a day. In the event that a resolution regarding costs is not reached,

the applicant has 14 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority