

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Michael Heriot (applicant)
AND	Asteron Life Limited (respondent)
REPRESENTATIVES	Mr Heriot represented himself Michael Quigg & Tim Sissons for the Company
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 31 July 2007
SUBMISSIONS RECEIVED BY	20 August 2007
DATE OF DETERMINATION	21 August 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed on 19 December 2006 Mr Heriot said he had been unjustifiably dismissed. He also claimed he was the victim of workplace bullying, negligence, bias and favouritism, misleading and deceitful behaviour and that the Company's handling of his concerns lacked due care. Mr Heriot sought \$100,000 for humiliation, etc, 7-months lost wages and a subsequent two and a half years of reduced earnings, exemplary damages of \$200,000, a formal letter of apology, a reference, costs and any other ruling the Authority saw fit to provide.

2. In its statement in reply received on 7 February 2007 the Company said Mr Heriot had been justifiably dismissed and that there was no basis for any valid personal grievance claim in relation to his employment.
3. The parties have undertaken mediation on several occasions.
4. During a telephone conference on 15 February the parties agreed to a two day investigation and relevant timetabling for the provision of witness statements and documents. Some delays occurred with the timetabling and the investigation was subsequently set down for 31 July and 1 August: as it happened the Authority completed its investigation on the first day.
5. In my memorandum recording the 15 February conference I drew Mr Heriot's attention to his remedies being well above the usual range awarded by the courts for successfully argued personal grievances. During the Authority's investigation Mr Heriot amended his claims to the extent that they reduced to claims for wages lost to July 2004 and compensation for humiliation, etc of \$40,000. In his closing submissions to the Authority (received on 7 August) Mr Heriot's identifies the remedies he seeks as "*\$20,000 for suffering and humiliation (and L)ost wages and differences in wages to be calculated*".

Background

6. I am satisfied from the evidence that the key events in this employment relationship problem can be accurately summarised as follows.
7. Mr Heriot was employed by the Company from 10 September 2001 initially as a part time call centre operator and subsequently as a call centre team leader, until his dismissal in March 2004 on the grounds that his actions and comments had "*.. seriously undermined the trust and confidence*" the respondent had in their employment relationship (letter of termination, document 2 in the respondent's bundle).
8. From 17 December 2003 until his termination on 21 March 2004 there were a series of increasingly negative and bitter events involving Mr Heriot and his manager before they in turn developed into large issues between the applicant and the Company. Without detailing all of what happened it is sufficient to say that a serious issue of incompatibility emerged between the two men: Mr Heriot then took issue with what he says was his employer's failure to properly inquire into alleged threats by his manager to the applicant's employment. The manager denied the claim. The Company was not prepared to reach

the conclusions urged on them by Mr Heriot. At around the same time the applicant felt he had been unfairly warned by the Company in respect of an email he had forwarded to team members.

9. Matters rapidly deteriorated. Other relevant events included Mr Heriot sending at least two emails to his manager in which, instead of addressing his manager by his first name (Mr Heriot's usual method of email address), the applicant – by joining the initial of his manager's first name to his family name – intentionally punned an unflattering personal view of his manager.
10. Mr Heriot claims that, from around this time, his manager began bullying him. The bullying took the form, the applicant says, of his manager "*micromanaging*" (oral evidence) him, including requirements he undertake demeaning and unnecessary retraining and doing so by deliberately requiring the applicant to sit so close they were in physical contact.
11. From 18 December 2003 the Company took various steps including a long series of meetings, with the manager and/or Mr Heriot. The Company also urged on the applicant, repeatedly, that he make use of the employee assistance programme and undertake temporary secondment as a customer care adviser, while a resolution to the compatibility issue was sought: Mr Heriot did not immediately co-operate with those recommendations.
12. Late in December 2003 the Company found it necessary to advise the applicant he should not involve other call centre staff in his issue with his manager.
13. After a day in the alternate position, Mr Heriot insisted on returning to the call centre: relations with his manager did not improve and both men found it necessary on occasions to leave the workplace, or take leave.
14. On 26 January 2004 the Company facilitated a "*mediation*" (the Company's description) between the two men: it did not end well. It was not convened on the basis of being without prejudice and in confidence. The Company's view, as the facilitator of their meeting, is that whereas Mr Heriot's manager was prepared to listen, make concessions and apologise, Mr Heriot could not reciprocate. As Mr Heriot explained in the Authority's investigation, as a result of that meeting he felt the issue was no longer between himself and his manager but was instead one of "*them against me: I felt betrayed*" (oral evidence).

15. Following a meeting on 29 January, and because of the applicant's continued insistence on returning to the workplace and what the Company felt were his parallel displays of anger and aggression, the Company decided to move matters "*to a more formal stage*" (par 27, statement of Ms Catherine Dixon's, the Company's Human Resources Manager). In two letters, one dated 29 January and the other 30 January 2004 (documents 11 & 12 in the respondent's bundle), Mr Heriot was put on notice of disciplinary matters that could affect his ongoing employment. The Company had particular concerns about the applicant disregarding instructions to not discuss the relationship issues he had with his manager with other call centre staff and his declared intention to disregard that instruction and "*rally the troops*" in his support (document 12). It also directed him to temporarily take up an alternate position (document 11).
16. The Company met with Mr Heriot on 9 February 2004: the applicant was represented by his union and its legal representative. The Company understood, as a result of that meeting, that it had agreement with Mr Heriot and his representatives as to a six-point outcome (documents 15 & 16 in the respondent's bundle). The six-points included Mr Heriot: accepting a 6-month written warning relating to his contacting call centre staff about his relationship problems with his manager; referral of matters of mutual concern to a Department of Labour mediator; and the applicant moving to a temporary secondment as well as voluntarily undertaking EAP services.
17. The following day Mr Heriot went on 5-days sick leave.
18. On 19 February Mr Heriot telephoned the Company's Customer Relationship Manager: the applicant says he asked that the plan agreed on 9 February be reviewed, the latter says Mr Heriot made it clear he no longer agreed to that plan. The Company shortly afterward advised the applicant's union and its legal representative that it had no option but to reconsider the concessions made on 9 February, call off the mediation scheduled for 1 March and to look at further disciplinary action (respondent's documents 18 & 19).
19. The parties next met on 1 March. Mr Heriot denied making any agreements at the 9 February meeting. He also said that, in respect of the 9 February meeting, he had been under the influence of medication (following the emergency removal the night before of gallstones). The Company advised it had decided to suspend the applicant on pay pending a new meeting date and its investigating his breaching of the 9 February agreement as well as his repudiation of the same (respondent's documents 21 & 22).

20. The Company met with Mr Heriot and his legal representative on 22 March: the respondent's representatives say they were concerned by the applicant's demeanour and conduct, his accusations they were lying and falsifying meeting minutes, of his "*almost physically threatening*" behaviour and his lack of awareness of the consequences of his actions (par 41, Ms Dixon's statement).
21. The Company determined to dismiss Mr Heriot on the grounds that his "*actions and comments since 19 February have seriously undermined the trust and confidence we have in our employment relationship with you*" (respondent's document 2).

Mr Heriot's Position

22. Mr Heriot describes the Company's behaviour toward him as not an organised (or orchestrated) litany of lies but rather a chaotic cacophony of contrivances (last page of his closing submissions received on 7 August 2007).
23. In those submissions Mr Heriot repeats much of what is set out above, including that his manager abused him in a one on one meeting and threatened his job for no cause. Mr Heriot says that manager then found it necessary to "*train*" (1st page, above) and micro-manage him. Despite assurances to the contrary from senior Company representatives, the manager continued the same bullying approach with "*one on one*" (2nd page, above) sessions. The Company unfairly failed to acknowledge that behaviour.
24. The manager's apologies were non specific and insincere, and were followed up by an attack on the applicant aimed at shutting him down. That approach was allowed by the same senior Company managers.
25. It was not fair on the applicant that he had to move to another position, or that the Company failed to offer other alternatives. Instead, he was increasingly seen as having the problem. Consequently, the applicant felt unable to understand or adhere to the Company's process or to its decisions in respect of him, particularly its six point plan.
26. Mr Heriot says the process leading up to, and the dismissal itself, had profound effects on his wellbeing: they included sleepless nights, a constant waking feeling that he was about to die, high blood pressure, depression, lack of self esteem, mood swings and feelings of isolation and desperation. He felt shafted by his employer. He felt the situation to be Salesmesque and deeply resented the impact the situation had on peoples' perception of him.

27. In respect of the letter written by his then representative, Mr Rob Moodie (see par 48) to the Company, Mr Heriot conceded that – while the former may have made some valid points – he was not shown his letter (before it was sent) and it was not reflective of his position: the letter was therefore not a formal statement of his position and its comments contained were not authorised.
28. Mr Heriot has always hoped that the Company would eventually do the right thing and reinstate him to his position: that “*would have been a total solution to me*” (4th page, above).
29. Mr Heriot’s final submissions (received on 20 August) repeat much of the matters already advanced by the applicant.

The Company’s Position

30. For the reasons set out below I am satisfied it is not necessary for me to summarise the respondent’s position.

Discussion and Findings

31. The law is well established that an employer may take appropriate action, including dismissal, where there is serious incompatibility in the workplace: see *Harris v Chief Executive, Department of Corrections* [2000] 1 ERNZ 544, par 6, etc.
32. The issue before the Authority is whether the action taken by the Company in dismissing Mr Heriot for the reasons set out in its letter of 22 March 2004 (respondent’s document 2), objectively measured, was within the range of actions a fair and reasonable employer would have taken in all the circumstances prevailing at that time: s. 103A of the Act.
33. I am satisfied the Company’s decision to dismiss Mr Heriot meets the requirements of s. 103A for the following reasons.
34. The evidence is clear that, from the moment incompatibility erupted between Mr Heriot and his manager the Company regarded the problem as serious and responded accordingly. It took proper steps. They included fully, promptly and fairly investigating the competing allegations and encouraging Mr Heriot – from a very early date and at its expense – to undertake EAP services and, after agreeing to him returning to his position (19 & 22 December 2003 and 5 January 2004) to temporarily work elsewhere; so as to effect “*a cooling down*” (par 6, Ms Catherine Dixon’s witness statement) between the two

men. The Company also allowed Mr Heriot significant paid time off work including special leave: in the period 17 December 2003 to his dismissal on 22 March 2004, and in addition to a number of part days, the applicant worked only 1 full day. It attempted a mediation between the two protagonists as well as participating in a number of meetings and many communications with Mr Heriot and his representatives in an attempt to arrive a mutually acceptable, fair and reasonable outcome.

35. This is evidence, I find, of a genuine effort by the respondent to fairly and reasonably address the concerns and distress evidenced by the applicant, his manager and other staff who were inevitably drawn into the dispute. It was also an appropriate response to a situation that seriously threatened the efficient operation of a vital arm of its business, the call centre.
36. There is no evidence to support Mr Heriot's view that the Company unfairly sided with his manager, or that – by the 26 January 'mediation' (the meeting of the two men facilitated by the Company) – it had become a situation of "*them against me*" (applicant's oral evidence). Mr Heriot clearly felt betrayed, but there is no objective evidence to support that conclusion. The applicant's attitude is evidence in itself of a person unwilling or unable to take a balanced perspective.
37. Matters worsened after the meeting on 26 January because it was apparent from Mr Heriot's reactions and attitude that there was little prospect of him and his manager being able, into the future, to work smoothly and co-operatively.
38. While it is unnecessary for me to apportion blame I am satisfied that it was incumbent on the applicant – particularly in the absence of a grievance by him disputing his employer's findings or its actions to date, or in respect of the implied warnings set out in the Company's communications and its stance toward the applicant – to work with the Company so as to build and maintain a harmonious working relationship. This necessarily required him to either work effectively with his manager (which, by 26 January 2004, was clearly no longer an option) or, by agreement with his employer, to come up with another outcome such as taking up another position.
39. I find that the Company, fairly and reasonably, after taking into account Mr Heriot's reaction to the 26 January meeting and in the absence of any fair or agreed alternative, required the applicant – on 29 January – to take up a temporary secondment and to cease involving call centre staff in his dispute. The opportunity was there (and had been for some time) for Mr Heriot to pursue his concerns while working outside of the pressure

cooker, i.e. by moving temporarily to another position, Mr Heriot was better placed to work through his growing concerns about his call centre manager, and his belief the Company was failing to properly respond to those concerns.

40. It follows that I find Mr Heriot unreasonably insisted on returning to his call centre supervisor's position.
41. Mr Heriot says his agreement to undertaking the 9 February 2004 meeting, and to its 6-point outcome, was given while he was in "*happy land*" (p. 29 above; oral evidence), as a result of the medication he had taken arising out of his hospitalisation the night before: he therefore believes himself to be not bound by the agreement. I do not accept that claim. That is because I am satisfied from the Company's record of the meeting on 9 February 2004 that it fairly and reasonably believed agreement had been reached with Mr Heriot as to the six-point outcome. Both the Company and Mr Heriot's experienced human resources/employment law practitioner properly checked with him during that meeting as to his fitness to participate: he confirmed he was (p. 27 of applicant's statement attached to his statement of problem). During the Authority's investigation Mr Heriot confirmed his representative had suggested postponing that meeting because of his medical treatment the night before, but that he had insisted on it continuing.
42. On a balance of probabilities basis I am satisfied Mr Heriot was fit to participate and – as the minutes clearly record – reach agreement as to future steps.
43. If I am wrong on the issue of Mr Heriot's fitness, I find in the alternative that the applicant did not resile from the agreement but instead asked of the Company's customer relationship manager, on 19 February, that – as he wanted his call centre job back – she "*review*" the situation (p. 30, above; oral evidence to the Authority). The manager asked, in respect of his request, had the applicant spoken to his legal representative? Mr Heriot confirmed he had "*but (he) had decided to ask the company to **reconsider** the decision of his secondment ...*" (emphasis added, par 35, Ms Gail Saipani's witness statement).
44. The Company was entitled to fairly and reasonably refuse that request.
45. It was also entitled to conclude that its efforts to meet Mr Heriot's concerns would never be accepted by him unless it acceded to his fundamental requirement; that he be returned to the call centre.

46. The Company was, after reflecting on Mr Heriot's stance and discussing the matter further with the applicant's legal representative, fairly and reasonably entitled to put the 6-point plan to one side and suspend the applicant. It reached its decision seemingly on the ground his return to the call centre would inevitably result in further disruption (between the applicant and his manager, but inevitably conflict that would draw in other staff), and because the Company was unsure it could continue to place trust and confidence in Mr Heriot.
47. I am satisfied that the Company was ultimately justified in dismissing the applicant following the failure of its wide ranging efforts to accommodate Mr Heriot's concerns. The rigidity of Mr Heriot's insistence on returning to his call centre position was only matched by the clear evidence of the profound incompatibility between the applicant and his manager: the Company was fairly and reasonably entitled to resolve this immovable object/irresistible force dilemma by dismissing the applicant.
48. I am therefore satisfied that Mr Heriot was not unjustifiably dismissed. I similarly reject Mr Heriot's related claims that he was disadvantaged by workplace bullying, negligence, bias and favouritism, misleading and deceitful behaviour and that the Company's handling of his concerns lacked due care.
49. I find support for the conclusions set out above in the respondent's document 27: it is a letter dated 26 October 2004 and headed "*personal confidential*" (but not without prejudice) from Mr Heriot's last legal representative, Rob Moodie. It is addressed to the Company. It is a powerful plea that he be reinstated. It is also a powerful acknowledgment of the shortcomings in Mr Heriot's behaviour. Amongst other things, it records how "*after a penetrating conversation with Michael ... he now realised that people, including (his manager) were trying to resolve what he should have realised was an event of relative inconsequence but (which) he allowed to get out of all proportion. ... His concluding words to me were "I've lost my job, my family is suffering because of it, and it is my own fault"*". There are a lot more concessions set out in this letter to similar effect.
50. Mr Moodie's communication of 26 October 2004 obviously did not result in his client's reinstatement. At the Authority's investigation Mr Heriot largely discounted the letter. He said he had not seen it before it was sent and had not sighted it until he received the respondent's bundle. While he had agreed to Mr Moodie's stated intention to make an approach to the Company on his behalf, he did not know of – or agree with – the concessions set out in the letter. I am satisfied that Mr Heriot's reaction to Mr Moodie's letter is similar to his reaction to the stance taken on his behalf by his representative at the six point meeting of 9 February 2004: at the point it no longer suits the applicant he

promptly repudiates his earlier position. The letter points strongly to the conclusion that Mr Heriot was the primary cause of the incompatibility, and subsequently his of his own dismissal.

51. In the alternative, were I to find that Mr Heriot was unjustifiably dismissed and/or disadvantaged, I am satisfied that – by any objective standard – the applicant's contributory conduct is such that he would not receive any financial compensation, per s. 124 of the Act.

Determination

52. For the reasons set out above the claim by Mr Heriot that he was unjustifiably dismissed is dismissed.
53. While costs are reserved I note that the contribution sought by the Company is \$3,000. Taking into account the extensive material relied on by Mr Heriot and, amongst other things, its role in assisting with orderly documentation, this is a realistic claim. As Mr Heriot appreciates, costs follow the event. Taking into account his financial situation, Mr Heriot could assist himself by promptly reaching agreement with the respondent on costs to be paid and a fair and reasonable payment regime.

Denis Asher
Member of Employment Relations Authority