

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 13/09
5102250**

BETWEEN DANNEIL KEIT
 Applicant

AND PICONE GROUP AUSTRALASIA PTY
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Clive Bennett for Applicant
 Bernie Humphreys for Respondent

Investigation Meeting: 1 October 2008

Submissions Received: 8 October 2008
 21 October 2008

Determination: 19 January 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Danneil Keit ("Ms Keit") claims she was unjustifiably dismissed from her employment with Picone Group Australasia Pty Limited ("Picone"). The parties were unable to resolve the problem between them by the use of mediation.

The facts

[2] Ms Keit commenced employment with Picone as a Sales Executive from 7 May 2007. The terms of the employment were recorded in a written individual employment agreement ("the IEA").

[3] The IEA contained a 3 month probationary period which expired.

[4] Ms Keit and Picone's director of sales Mr Bernie Humphreys ("Mr Humphreys") had a telephone conversation on 13 July 2007. Mr Humphreys supervised Ms Keit from Australia. There was discussion of several points in relation to Ms Keit's work but principally it concerned ACT database updates and communication in relation to it. Ms Keit conceded that on two occasions she had not despatched the database correctly. She agreed to do better.

[5] Mr Humphreys emailed this letter to Ms Keit on 24 August 2007:-

This is your 2nd official warning in relation to your lack of communication, lack of customer visits and lack of regular ACT updates.

This warning confirms the telephone conversation held on the 13th July in relation to the above issues.

Continued poor performance or failure to improve will result in a review of your employment and may lead to termination.

It is expected that you will improve your performance immediately.

Your performance will be reviewed again on 31st August. This warning will be placed on your personnel file.

If you would like to discuss the matter with me further, please do not hesitate to contact me.

[6] Ms Keit composed a response addressed to Picone's executives the same day. Ms Keit advised she too had an issue with communication and was not satisfied with expense reimbursement. She concluded on a positive note looking forward to further assistance from the executives and achieving even greater sales and business in New Zealand.

[7] Mr Humphreys responded by email of 27 August 2007. He wrote:-

Thank you for taking the time to formulate a complete response. I have read your letter thoroughly and it suggests a grave lack of support from management. If this is truly the case, I sincerely apologise personally and on behalf of Garry and Suzy. We pride ourselves in caring for all our sales executives and for extending them the best support we possibly can. I implore you to increase your communication with me personally and to escalate any issues you have to my attention. I promise you will get all the support and help possible to deliver awesome customer service. That's what I'm here for! With regards to your ACT updates, it is a critical condition of your employment to send completed sales activities by way of "ACT syncs" every day. I am flexible and understand that occasionally it's not practical to send them every single day however your current lack of "ACT syncs" is unacceptable. As for your expenses, you need to send in your claim with receipts before the advance is depleted. It is simply not practical

to have them approved and reimbursed the same day. This will avoid you having to use your own funds. The extra \$71 you refer to should be claimed as part of your normal monthly expense claim. You are not required to carry this burden.

Danneil, you are a valued member of the team and you are a promising high performer. I hope that we can put the past behind us and enjoy a strong working relationship moving forward. What I ask of you is this:

- continue your growing sales*
- send through your ACT syncs daily*
- visit 28 customers/prospects weekly*
- communicate often and escalate issues whenever required*

If you feel you are unable to achieve this, please let me know as a matter of priority. I promise to help you however I can in my capacity as sales manager. As for your Wellington trip, you should phone me with details so I can arrange flights, car hire, hotel etc, for you.

[8] On 30 August 2007 Ms Keit emailed Mr Humphreys from her blackberry:-

Hi Bernie. Wanted to let you know I have been to the doctors early this morning with asthma. I am on my way home now. I will be in contact with you this afternoon regarding the review, I will proceed with next weeks appointment booking this afternoon as well. Should you require a doctors certificate one can be faxed. Thanks.

[9] Picone dismissed Ms Keit the next day by email dated 31 August 2007. Mr Humphreys wrote:-

Although we have given you every opportunity to improve your performance we have seen no sign of any significant improvement. Accordingly this is to advise that your employment with Picone Group Australasia Pty Limited is terminated effective today. You will be paid an amount in lieu of notice in accordance with your entitlements.

The merits

[10] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[11] Picone had issues with Ms Keit's performance. These issues related to communication, customer visits and ACT database updates. I accept that Mr Humphreys discussed these issues with Ms Keit in the telephone conversation held on 13 July 2007. Ms Keit says that she was not given a formal disciplinary warning in that telephone conversation. But when she replied to the letter of 24 August 2007 headed "Re: 2nd official warning" she did not deny being previously warned. Quite the contrary, her own response of 24 August 2007 refers to a warning given to her "in regards to visits". I conclude Ms Keit was given formal warning.

[12] Mr Humphreys wrote on 27 August 2007 asking that Ms Keit continue growing her sales, sending through ACT syncs daily, visiting 28 customers/prospects each week and communicating often and escalating issues when required.

[13] Only four days later Ms Keit was dismissed. She was dismissed by email. I find that it was not fair to dismiss Ms Keit in such circumstances. I do not agree that Ms Keit was given "every opportunity to improve" and nor do I accept that Picone could take the view that Ms Keit had failed to improve. It does not persuade me of any serious failings by Ms Keit during the four days between 27 August 2007 and the dismissal on 31 August 2007. In addition, I do not accept Ms Keit was provided an opportunity to respond to Picone's concerns before it emailed her that she was dismissed.

The determination

[14] I determine that Picone's actions were not the actions of a fair and reasonable employer. **I find that Ms Keit was unjustifiably dismissed and she is entitled to remedies in settlement of that personal grievance.**

The resolution

[15] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Keit's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that

would otherwise have been awarded accordingly. I do not consider there was any blameworthy conduct on Ms Keit's part which is to be regarded as contributory fault.

Reimbursement

[16] Ms Keit was out of work for 14 weeks before she found alternative income. I am satisfied that she took steps to mitigate her losses by finding other work. I find she has lost wages as a result of the personal grievance I have found. I award her 14 weeks lost wages in the gross sum of \$9,940.00. **I order Picone Group Australasia Pty Limited to pay to Danniell Keit the gross sum of \$9,940.00 as reimbursement.**

Compensation

[17] Ms Keit says she was extremely hurt and humiliated by the manner in which her employment was so abruptly terminated. Ms Keit was dismissed by email. I accept Ms Keit has suffered hurt and humiliation. Having regard to her evidence, the period of her service and the nature of the personal grievance, I award her \$5,000.00 compensation. **I order Picone Group Australasia Pty Limited to pay to Danniell Keit the sum of \$5,000.00 as compensation.**

Costs

[18] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Bennett is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Humphreys is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority