

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 115  
5523190

BETWEEN                      AMIT KUMAR  
Applicant

A N D                              NZ MOBILES LIMITED  
Respondent

Member of Authority:      T G Tetitaha

Representatives:            M Nutsford, Advocate for the Applicant  
S Sharma, Counsel for the Respondent

Investigation Meeting:      16 April 2015 at Auckland

Submissions Received:      16 April 2015 from Applicant  
16 April 2015 from Respondent

Date of Determination:      21 April 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Amit Kumar was unjustifiably dismissed by NZ Mobiles Limited.**
- B. I order NZ Mobiles Limited pay lost remuneration of \$6,666.66 less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- C. I order that NZ Mobiles Limited pay compensation of \$1,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. There is no reduction of remedies for contributory behaviour pursuant to s.124 of the Employment Relations Act 2000.**
- E. Costs are reserved. Both parties have consented to the application of the Authorities daily notional tariff of \$3,500. Both parties accept there are no factors increasing or decreasing the start point.**

**I require copies of the parties' invoices prior to costs being awarded. These shall be filed 14 days from the date of the determination together with any further costs submissions. I shall determine costs on the papers.**

### **Employment relationship problem**

[1] The parties agree Amit Kumar was unjustifiably dismissed. The remaining employment relationship dispute is about remedies.

### **Facts leading to dispute**

[2] The respondent company, NZ Mobiles Limited, owns and operates a 2 degrees franchise in Avondale and Lower Hutt. At the material time it was operating a store at 55 Cuba Street, Wellington

[3] In early May 2014, Mr Kumar met with Robin Babu, respondent director, about a job at the Cuba Street store. There is a dispute about what was discussed by the parties.

[4] On 27 May 2014, Mr Kumar started employment as a business development manager. His job was to sell 2 degrees mobile connections to business clients. This involved 'cold' calling businesses about changing to 2 degrees and following up on 'leads' or people who had contacted the franchise to speak to a representative about 2 degrees.

[5] He signed an individual employment agreement which provided for remuneration of \$40,000 gross salary and \$10,000 car expenses. He had a sales target of \$10,000 per month including GST and 35 new connections. He was paid a performance bonus for achieving gross profit (GP) above his \$10,000 target. This bonus was adjusted if he did not achieve sales targets in previous months.

[6] Between 27 May and 1 June 2014, Mr Kumar undertook four days' training in Auckland.

[7] On 11 June Mr Babu emailed Mr Kumar asking about his appointments and his GP. Mr Kumar replied stating he was hoping to hit his GP around \$4000, was working on a big deal of 18 connections worth \$2,000 and had appointments next week.

[8] Between 17 and 19 June 2014 Mr Kumar undertook 3 days training with 2 degrees Head office.

[9] In June 2014, Mr Kumar made no sales.

[10] In July 2014 Mr Babu travelled to Wellington and took Mr Kumar to a sales appointment with him. On or about 29 July he raised concerns about Mr Kumar's sales performance. Mr Kumar said he was working hard to increase numbers and asked for 'leads.' Mr Babu emailed him again asking if his calendar had been updated. Mr Kumar replied 'not yet will do as I am out for fast sales'.

[11] In July 2014, Mr Kumar's gross sales were \$1,685.52.

[12] On 11 August 2014 Mr Kumar sent out an unsolicited email to a number of businesses asking them to contact him. One recipient asked to be removed from the database because the email was unsolicited.

[13] On 13 August 2014, Mr Babu instructed his National Sales Manager, Nimit Tailor, to send an email to Mr Kumar seeking an explanation for his failure to meet the sales target and to avoid disciplinary action Mr Kumar was required to meet his monthly target of \$15,196 excluding GST by 20 August 2014. The email asked that Mr Kumar reply with an acknowledgment that he had been given the opportunity to present his views and explanations and was agreeing to this review prior to it being placed on his personal file.

[14] Mr Kumar did not reply to the email. Instead he tried to ring Mr Tailor who directed him to Mr Babu. Mr Babu returned his call but Mr Kumar was away on sick leave.

[15] On 20 August 2014, Mr Kumar received a call from Mr Babu who advised that his employment was terminated and his last day was 21 August 2014.

[16] In August 2014, Mr Kumar's total sales were \$1,049.24.

[17] On 21 August 2014 Mr Kumar's employment ended.

[18] On 4 September 2014, Mr Kumar raised a personal grievance.

[19] On 4 November 2014, a Statement of Problem was filed.

[20] On 20 November 2014 at a teleconference the parties agreed the applicant had been dismissed. The respondent confirmed the dismissal had occurred pursuant to an alleged 90 day trial period provision.

[21] On 13 February 2015 at a teleconference the respondent advised it accepted the 90 day trial period was not in writing and therefore unenforceable. It also accepted the dismissal was unjustified but wished to give evidence about remedies if the parties were unable to resolve the matters between themselves.

[22] The matter was unable to be resolved and is before me for determination.

### **Issues**

[23] There are two issues for determination:

- (a) What remedies should be ordered? and
- (b) Was there contributory conduct requiring a reduction in remedies?

### **Determination**

[24] The fact Mr Kumar's employment was terminated pursuant to an alleged 90 day trial period provision is accepted. The onus falls upon NZ Mobiles Limited to justify whether its actions "*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*" (s103A(2) of the Employment Relations Act 2000 (the Act). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[25] The parties accept the unsigned copy of the employment agreement produced by the respondent is the one that applied to these parties.<sup>1</sup> The employment agreement does not include a written trial period clause.

[26] Section 67A of the Act sets out when an employment agreement may contain a provision for a trial period of 90 days or less. Section 67A(2) states:

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<sup>1</sup> Sworn Brief of Evidence R Babu Annexure C

*“Trial provision” means a written provision in an employment agreement that states, or is to the effect, that –*

- (a) for a specified period (not exceeding 90 days) starting at the beginning of the employee’s employment, the employee is to serve a trial period; and*
- (b) during that period the employer may dismiss the employee; and*
- (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

[27] A fundamental requirement for a 90 day trial period to be enforceable is that it is a written provision in an employment agreement. The respondent properly conceded that it does not have a written trial provision in its employment agreement for a 90 day trial period.

[28] Given the respondent dismissed the applicant based upon a mistaken view of the law about trial periods it did not follow any of the legal requirements of s103A. The dismissal cannot be justified. The failure was not minor and did result in unfairness to Mr Kumar. Amit Kumar was unjustifiably dismissed by NZ Mobiles Limited on 21 August 2014.

### **What remedies are payable?**

[29] Having found there was a personal grievance of unjustified dismissal, I am now required to consider the award of remedies under s123 of the Employment Relations Act 2000 (Act).

### ***Lost remuneration***

[30] The applicant seeks three months lost remuneration pursuant to s123(b). His mitigation evidence were copies of confirmations of job applications made through the SEEK job website. He accepts he stopped applying for jobs in November 2014 because he was undertaking due diligence on the purchase of a courier business. He purchased the business on 2 December 2014.

[31] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer

pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to s128 of the Act.

[32] In considering an order for remuneration under s128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.<sup>2</sup> An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.<sup>3</sup>

[33] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like<sup>4</sup>.

[34] It is accepted Mr Kumar was not paid one month's notice period as required under clause 12 of the employment agreement. Accordingly he is entitled to recover one month's lost remuneration and I shall order the payment of notice accordingly.

[35] I have considered carefully the evidence of Mr Kumar's job applications. He applied for a total of 22 jobs over two months - 5 jobs from 26 to 29 August 2014, 11 jobs in September 2014 and 6 jobs in October 2014. The number of job applications over the period of time is relatively low. He made one job application per day and not necessarily every day of the week. The amount of time involved emailing a cover letter and CV would be 10 to 15 minutes each day (330 minutes). Mr Kumar received 2 to 3 phone interviews during this period possibly requiring an hour each time (180 minutes). At most his efforts equate to 510 minutes or two six hour working days. What efforts Mr Kumar may have done to find work for the remainder of the time is unknown.

[36] There is no other information about any other efforts to find employment other than through the SEEK job website. He did not engage an employment recruitment firm or look at jobs through WINZ or even other job websites. The evidence does not appear to support reasonable efforts to mitigate losses in the final analysis.

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<sup>2</sup> *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

<sup>3</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

<sup>4</sup> *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

[37] It is common ground Mr Kumar stopped looking for work by 21 October 2014. Despite this he seeks recovery of lost remuneration from 22 October to 21 November 2014. I have no evidence of what Mr Kumar was doing from 21 October to 1 November 2014. His evidence is from the beginning of November he started discussions about the purchase of a courier business.

[38] The applicant representative properly conceded the evidence did not support all of November being spent undertaking due diligence for the proposed purchase of the courier business, although he submitted the last two weeks were spent riding with the drivers, meeting customers and learning the systems.

[39] I see no logical basis to award lost remuneration for periods an employee has stopped looking for work. The evidence is that he lost remuneration from 21 October 2014 not as a result of his dismissal, but from his decision not to seek work. That decision broke the necessary chain of causation<sup>5</sup> required to show lost remuneration for this period. Accordingly I decline to make any award for lost remuneration from 21 October 2014.

[40] The Court of Appeal has held there is no automatic entitlement to full compensation, moderation is required in setting awards for lost remuneration and any award of compensation must have regard to the individual circumstances of the particular case. It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment.<sup>6</sup> The Court has recently applied the "counter-factual analysis" in setting the amount of lost remuneration.<sup>7</sup>

[41] In my view there should properly be an allowance for contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the Mr Kumar's employment. Mr Kumar was not meeting his agreed monthly sales targets of \$10,000. There was evidence his sales were decreasing.

[42] I do not accept the monthly target of \$6,000 and \$10,000 could not have been met. Some employees were meeting and exceeding targets. Others were not. The

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<sup>5</sup> *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976, 981

<sup>6</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [36] and [37]

<sup>7</sup> *Hall v Dionex Pty Ltd* [2015] NZEmpC 29

reasons and outcome for employees not meeting targets varied from holiday leave and performance issues leading to dismissal. The situation of these employees had little bearing upon Mr Kumar's ability to meet his targets.

[43] When questioned, Mr Kumar believed he needed more time to build up sales but had no plan as to how he was going to do so. He intended doing what he had done in previous months despite this not increasing his sales. I accept the evidence about his difficulties in 'closing' sales. He had been given training but should have had experience in closing sales from his previous jobs including one for two years selling copiers and printers. I do not accept this customer base or product made closing sales. This appeared to be a skill issue which training did not resolve.

[44] This was a small company with up to 11 to 12 employees. It could not have financially tolerated a lengthy period of underperforming by Mr Kumar. He was being paid \$3,333.33 gross per month, made zero sales in June, \$1,685.52 in July and \$1,049.24 in August. His monthly sales were not covering his overheads let alone meeting his agreed target of \$10,000.

[45] An issue was raised about his leaving secure employment to take this job. I have no details about his previous employer other than their name. I did not have evidence about his previous job to assess whether it was secure or not. There may have been other factors that caused him to take up the respondent's job offer. It has little bearing on remedies in the circumstances.

[46] Applying a counter-factual analysis to these circumstances, I conclude it is more probable Mr Kumar's employment would have ended shortly after the unjustified dismissal. He could not have expected ongoing secure employment.

[47] In the circumstances Mr Kumar's lost remuneration shall be limited to two months being \$6,666.66 less PAYE subject to any contribution to be determined below.

### ***Hurt and humiliation***

[48] Mr Kumar seeks payment of \$10,000 for alleged hurt and humiliation. He referred to the average compensation awards in the Authority which are currently \$5,000.

[49] The evidence of hurt and humiliation is very sparse. Mr Kumar alleges he went into a depressive state and had difficulty sleeping. He also refers to the hurt and humiliation of telling his immediate family including his parents who were staying with him at the time.

[50] Compensation should not be used as a penalty to indicate disapproval of an employer's conduct. Rather, it is to compensate the employee for the effect of the grievance.<sup>8</sup>

[51] While an average may provide a useful starting point, it fails to take into account the individual factors in each case. It is the actual hurt and humiliation suffered by this respondent that is important. The amount of remedies awarded must be reflective of the loss suffered.<sup>9</sup>

[52] I accept the loss of the job would have been shocking for Mr Kumar. However, the evidence does not justify an award of \$10,000. The starting point for the amount of hurt and humiliation would be \$5,000.

[53] There was no permanent disability as a result of the loss of the job. Mr Kumar did not require any medical assistance. The physical effect of his hurt and humiliation appears to be temporary sleep disruption. At the time of his dismissal he had been employed for a little over two months.

[54] By 26 August 2014 he was actively applying for jobs. He had instructed an advocate by 4 September 2014 to raise his personal grievance. Mr Kumar accepted he was attending sports events by 8 November 2014. There was no medical diagnosis of depression. While there would have been some humiliation in telling his family of his job loss, this did not appear to negatively impact upon his relationship with them. His wife and parents continue to support him. A modest award to mark the temporary hurt experienced by Mr Kumar is appropriate.

[55] NZ Mobiles Limited is ordered to pay Amit Kumar compensation of \$1,000 subject to any contribution below.

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<sup>8</sup> *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC)

<sup>9</sup> *Ballylaw Holdings Ltd v Henderson* [2003] 1 ERNZ 313 at [80] and [81].

### *Contributory conduct*

[56] The respondent submits there was contributory conduct including Mr Kumar failing to meet his performance targets and using spam email against company policy causing embarrassment. It submits he should have expected dismissal to be an inevitable outcome even if a proper process had been followed. It refers to his failure to achieve targets of \$10,000 per month including GST despite his promise to bring an established customer base, alleged experience in sales and the paid training. Mr Kumar did little when given assistance including failing to update his calendar so he could be given 'lead' appointments. It was costing the respondent money to retain Mr Kumar as a salesperson.

[57] An employee's conduct may be relevant to remedies. Section 124 of the Act requires the Authority "*consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance*" in deciding the nature and extent of remedies to be provided in respect of a personal grievance.

[58] In order for contributing behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].

[59] Although there may have been underperformance and conduct such as the SPAM email which may appear blameworthy, it was not causative of the outcome. The respondent dismissed Mr Kumar pursuant to an alleged 90 day trial period.

[60] In the circumstances, I decline to make any reduction for contributory conduct.

[61] Accordingly, I make the following orders:

- (a) Amit Kumar was unjustifiably dismissed by NZ Mobiles Limited.
- (b) An order NZ Mobiles Limited pay lost remuneration of \$6,666.66 less PAYE pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

- (c) An order that NZ Mobiles Limited pay compensation of \$1,000 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.
- (d) There is no reduction of remedies for contributory behaviour pursuant to s.124 of the Employment Relations Act 2000.

### **Costs**

[62] Costs are reserved. Both parties have consented to the application of the Authorities daily notional tariff of \$3,500. Both parties accept there are no factors increasing or decreasing the start point. I require copies of the parties' invoices prior to costs being awarded. These shall be filed 14 days from the date of the determination together with any further costs submissions. I shall determine costs on the papers.

**T G Tetitaha**  
**Member of the Employment Relations Authority**