

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tristan Lupi

AND We Want You Motor Group Limited

REPRESENTATIVES Applicant In Person
Mark Ryan, Counsel for Respondent

INVESTIGATION MEETING 15 February 2007

SUBMISSIONS RECEIVED From applicant, 23 March 2007
From respondent, 20 April 2007

MEMBER OF AUTHORITY Dzintra King

DATE OF DETERMINATION 16 May 2007

DETERMINATION OF THE AUTHORITY

The applicant, Mr Tristan Lupi, says he has been unjustifiably dismissed by the respondent, We Want You Motor Group Limited; or, that he has been disadvantaged. Mr Lupi also claims that deductions have been made unlawfully from his wages and that he is owed commission payments. The respondent says Mr Lupi was not dismissed and that he consented to the deductions.

Mr Lupi was employed in April 2004 as a salesman working in Takanini. In August 2004 Mr Lupi was offered and accepted the position of Branch Manager at Hamilton and started working there in September 2004.

Mr Lupi said the General Manager, Mr William Murdoch, became increasingly difficult to deal with and his behaviour became more and more irrational and tyrannical. Neither party called Mr Murdoch as a witness and his whereabouts were unknown.

Mr Lupi said some of his staff approached him about holiday pay in December 2004. He sent an email to the Auckland office and understood there had been a crisis meeting as the company had never paid employees for statutory holidays. However, all staff were duly paid their entitlements. Mr Lupi said Mr Murdoch told him that it had cost Mr Coe, the director, ten of thousands of dollars including all the back pay that had been owed.

Mr Lupi said that in December Mr Murdoch asked him how he would feel about going back to Auckland as they needed a "gun salesman" in Takanini. Mr Lupi told Mr Murdoch that he did not want to go back to Auckland. Mr Murdoch told him he didn't have a choice and that he would be assistant to the General Manager and would be the manager at the Auckland branch when Mr Murdoch was not there.

However, from his second day back in Auckland Mr Murdoch was extremely hostile to him and attempted to humiliate him in group meetings. Mr Lupi said he had been demoted to a salesman and all his managerial responsibilities had been taken away from him. In his evidence Mr Lupi said that

for the first week or so he did fill in for Mr Murdoch then he came down hard on him and was rude and dismissive. Mr Murdoch decided to make another person the sales manager. After some weeks Mr Coe dismissed Mr Murdoch.

Sometime after Mr Murdoch's dismissal Mr Coe said Mr Lupi had been to see him and told him that Mr Murdoch had approached him to leave and work with him on a new venture.

Mr Lupi said that while Mr Murdoch had been General Manager he had been afraid of bringing anything up as Mr Murdoch was dictatorial and Mr Lupi was afraid of being fired. Mr Lupi also said he was worried about taking matters to Mr Coe as he had financial pressures and was worried that he might be dismissed as Mr Murdoch had been.

Mr Coe said he understood that Mr Lupi's return to Auckland had taken place after a discussion with Mr Murdoch and that it had been by agreement because Mr Lupi was finding the travelling burdensome. He said Mr Lupi had told him that the money in Auckland had been better.

Mr Coe said the first he knew that there was a problem was a letter dated 20 April 2004 sent by Mr Lupi. Mr Lupi wrote:

As I have made aware to you on a number of occasions I am at a loss as to the reasons behind my recall/demotion from my position as Sales Manager at the Hamilton Branch and my subsequent demotion/displacement from my position as 'assistant to the General Manager' in Auckland as I purportedly became on my return to Auckland.

Until recently I had thought that the recently deposed General Manager Murdoch was the sole force behind my demotions, but I now feel this may not have been the case. I also feel that assurances by you to "wait and see what happens" etc may not be of much substance.

I am continually dismayed by the performance of the current Sales Manager (and my de facto replacement) in Auckland, and this only serves to strengthen my desire to find out the real reasons behind my recall/demotions.

My recall from Hamilton as Sales manager toward the end of January occurred days after I had requested the payment of Statutory Holidays from the company, and I would not be surprised if this was more than mere coincidence. Recently Murdoch stated to me that you "really hated me" for requesting the payout of Statutory Holidays as I believe it cost the company some \$15000 at the time in back pay to its employees.

As I have also made aware to you there are a number of other employment related issues that I feel are contrary to our employment agreement including the unilateral removal of 'bonuses', the money dues system, and the employment of extra salesmen. My main concern at the moment however is the one I have described in depth, namely that of my demotion, as it has continued to eat away at me particularly as I am still in the dark as to the cause.

I write to you in the hope that you will address and respond to my concerns appropriately.

Mr Coe replied saying he was concerned that although Mr Lupi had been working at the same premises as Mr Coe for the last three months he had not approached him about any of his concerns. He asked Mr Lupi to come to a meeting and added:

In the meantime, I may add that I was under the impression that you were happy with the arrangement to return to Auckland. Especially in view of the fact that your income has now increased, although it may not be the same position as you had in Hamilton.

Mr Coe and Mr Lupi met on 3 May and went through the letter. Mr Coe told Mr Lupi that he was unhappy that Mr Lupi had not said anything to him when he had spoken to him about Mr Murdoch's approach. At the end of the meeting Mr Coe told Mr Lupi that he had a future in the company and as the company was growing there would be opportunities in the future. Mr Lupi said as he was leaving that he had had to get the letter in so that he would have a case when he left. He said "I will

probably take you to court for a laugh". Mr Coe said he was surprised at this and as he was leaving Mr Lupi had said "Well, that's what I'm trained in, I'm a lawyer".

Mr Coe said Mr Lupi's behaviour deteriorated over the next few months. On 5 June 2005 he was given a formal written warning regarding continued late arrival at work. He had previously received a similar warning from Mr Murdoch in January 2004. On 28 August 2005 he gave a written apology to the Takanini manager regarding an altercation he had had with him the previous day

On November 4 2005 Mr Lupi wrote saying that he believed he had been unjustifiably dismissed from his position as Branch Manager in Hamilton and then again from his position as assistant to the General Manager in Auckland. He asked to go to mediation.

On 23 November Mr Lupi wrote:

As per our telephone call earlier today, and in part due to the discovery that two more salesmen have been employed at the Auckland branch of WWYMG without any consultation or notice afforded to me, and in part due to the ever deteriorating conditions of my employment, I wish to resign from my employment at WWYMG effective immediately, both of us having agreed to waive any period of notice that may otherwise have been required.

Subsequently, Mr Lupi started work at Payless Cars on 2 December 2005. Mr Coe said he understood that Mr Lupi had recommended to Payless Cars that Mr Murdoch be employed in a managerial position. Mr Lupi said he had not made a recommendation but that there had been a discussion about the employment of Mr Murdoch who was employed by Payless Cars.

Between 2 and 26 December Mr Lupi sent a number of emails to employees of WWYMG encouraging staff to leave WWYMG and work at Payless Cars. Four staff left WWYMG to work for Payless Cars which later went into receivership.

I was given a number of emails between a Ms Thomson, at that stage an employee of the respondent, and Mr Lupi. These emails show that Mr Lupi was encouraging Ms Thompson to leave her employment and it is clear that by 2 December Mr Murdoch, with whom Mr Lupi had insisted he had great difficulty, was also working at payless Cars as General Manager. Ms Thomson had also had discussions with Mr Murdoch about employment at payless cars. Ms Thomson wrote:

Today last day. I'll have my phone off tomorrow, no doubt [sic] Nathan will try and ring me. My letter however will state that I consider that to be harassment, so best he doesn't. Legally I don't really know where I stand starting a new job straight away, but I've got enough ammo to frighten him with false applications to keep them away.

Mr Lupi said he thought a number of the staff should have taken personal grievances.

"Money Dues"

This is in essence payment of commissions. The employment agreement set out the payment rate. The signed amendment to the agreement dated 30 August 2005 provides:

The employee will be paid \$500 commission per vehicle sold and paid out.

The respondent at one stage instituted a practice of lending potential buyers \$500 as a deposit on the vehicle to be purchased in order to be able to obtain credit through the finance company. The commission was not paid to the salesperson until the salesperson had recouped the \$500 from the purchaser.

The employment agreement does not provide that commission can be withheld in those circumstances. If there are commission payments that the respondent has not made because Mr Lupi has not recouped the \$500 deposit from the purchaser of the vehicle those commissions should now be paid. If there is any dispute about what is owed leave is reserved to return to the Authority.

Bonus Payments

Bonus payments are set out in the agreement. These were also varied on 30 August 2005. There was some discussion regarding extra contractual bonus payments. I accept that those were discretionary and able to be varied by the employer.

Lock Up Fees

The respondent charged employees a penalty payment of \$25 if they failed to lock up. The statutory provisions regarding deductions from wages cover this situation and the three payments deducted were unauthorised and should be refunded.

Disadvantage/Dismissal

Mr Lupi was not dismissed nor was he disadvantaged. I do not accept Mr Lupi's account of his return to Auckland. Nor do I accept that a promise was made that he would be the Assistant to the General Manager. In light of Mr Lupi's later involvement with Mr Murdoch at Payless Cars, and the approach made to Mr Lupi by Mr Murdoch after his dismissal from the respondent, I cannot accept his evidence about his poor relationship with Mr Murdoch and his fear of him.

Mr Lupi does not have a personal grievance.

Costs

Costs were reserved. If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member
Employment Relations Authority