



- If the dismissal is unjustified, then the calculation of remedies to Mr Lingenfelter. At the commencement of the investigation meeting Mr Lingenfelter made it clear that he had voluntarily abandoned his claim for reinstatement and therefore the remedies claimed are purely financial.

[3] Unfortunately, it is clear that TBN South Pacific had not facilitated the Authority's investigation. While it was represented by counsel the fact remained that none of the three key people involved in Mr Lingenfelter's dismissal gave evidence in person. Mr Owen Sunnex, TBN South Pacific's sole director and the person who wrote the dismissal letter had intended to attend, but unfortunately serious illness precluded him from appearing. I accept that it was preferable to take Mr Sunnex's evidence by telephone rather than adjourn the investigation meeting until his medical condition improved, as there was no guarantee it would improve sufficiently, in the short term, or indeed ever, to allow him to fly. I also accept that it was never envisaged that Mr Terry Hickey, the Vice President, International Relations of TBN would attend in person given that he was based in the United States, and he did not provide a statement accordingly.

[4] However, TBN South Pacific never made any arrangements for the third person involved in the dismissal, Mr Alex Panetta, the Managing Director of TBN Australia, to whom it was claimed Mr Lingenfelter reported directly around the time of his dismissal, to attend the investigation meeting, despite providing a witness statement and knowing his attendance was expected accordingly. This situation did not change even after it was apparent that Mr Sunnex could not attend in person. The Authority was never informed of this matter and unlike the situation with Messrs Sunnex and Hickey, TBN South Pacific's actions over Mr Panetta's non-attendance were inexcusable. The attendance by Messrs Sunnex and Panetta by telephone link was far from satisfactory.

## **Credibility**

[5] It is difficult for the Authority to determine what occurred over a year ago, particularly where some matters are disputed. This task is made even more difficult when only Mr Lingenfelter and his fellow former Board member attended the investigation meeting in person. Mr Sunnex and Mr Panetta's evidence could only be questioned by telephone link. The Authority must make determinations on disputed

matters on the balance of probabilities i.e. what is more likely to have occurred than not. Where there is no contemporaneous documentary evidence I have preferred Mr Lingenfelter and his fellow ex Board member's evidence, as they have been fully questioned in person and the respondent's witnesses have not.

### **The Facts**

[6] Mr Lingenfelter was employed as an assistant administration office, auditor and prayer co-ordinator by TBN South Pacific Ltd (TBN South Pacific), a broadcaster of religious material. His employment commenced towards the end of 2003. The particular nature of the relationship is well set out in the parties' latest employment agreement, which was executed on 1 February 2007. It notes as follows:

*Trinity Broadcasting Network South Pacific Ltd is owned by Trinity Christian Centre of Santa Ana, California, d.b.a. Trinity Broadcasting Network (TBN-USA), and is operated in New Zealand and the South Pacific by Elijah Communications Trust (ECT) on behalf of TBN-USA.*

*Therefore all TBN South Pacific staff are paid by ECT and are accountable in the first instance to ECT and ultimately accountable to TBN-USA.. ECT undertakes all compliance issues pertaining to this employment agreement including but not limited to, taxation, occupational health, work environment, employment reviews and so forth. In this document "TBN" first collectively to TBN-USA, TBN South Pacific and ECT.*

#### **1. Call to Serve**

*The parties acknowledge that TBN is a call to Christian service. As such, Michael acknowledges that this employment is in line with God's will for his life ...*

*The signing of the employment contract is taken as acknowledgement of the special relationship between "Employer and Employee" and this is instanced as being a team relationship for the purpose of following the calling of God, rather than a strictly contractual Employer-Employee arrangement.*

[7] Under the agreement Mr Lingenfelter was obliged to report to the *Director TBN South Pacific Ltd (Mr Owen Sunnex), or to any other representative of TBN designated from time to time.* His normal hours of work were said to be 40 per week between 8.30am and 5.30pm Monday to Friday, but were flexible so that he could regulate his hours himself, within reason, making sure that all his responsibilities were met. The employment agreement also provides for payment of redundancy compensation dependent on service, and as required by law, a section on resolving

employment relationship problems. That clause, Clause 14 states, amongst other things:

*If the employment relationship is to be as successful as possible, it is important that employer and employee deal effectively with any problems that may arise...*

(iii) ***Discuss the problem one on one with the person concerned.***

*If either party considers that there is a problem, Matthew 18:15 applies and should be raised as soon as possible.*

*This can be done in writing or verbally. Both parties should treat the dialogue with priority on respecting and preserving relationship. Remember that the whole message of the Bible is about relationships – how it was damaged – how God paid to make reconciliation possible – and how we should avail ourselves of the restoration He purchased. Have this thought uppermost as you direct the initial dialogue towards confirming the facts and establishing whether there is a real problem or mere misunderstanding*

*Matthew 18:15 directs that the problem be raised first with the person concerned.*

[8] As well as was being an employee of TBN South Pacific Mr Lingenfelter had also been, since January 2004, a trustee of ECT, who paid TBN South Pacific staff and to whom they were accountable on behalf of TBN-USA.

[9] Between March and May 2008 TBN-USA worked through the ECT Board to pass on management of TBN's assets in the South Pacific region to a new network to be established, namely Trinity Broadcasting Network Australia. That network was to be run by Mr Alex Panetta, who had previously worked as a consultant for TBN in the IT field. Mr Lingenfelter and another Trust Board member vehemently opposed this initiative but were unable to persuade other Board members, who were led by Mr Sunnex.

[10] As a result of the shift of many functions to Australia in around September 2008, Mr Lingenfelter's role as an employee in auditing much of the operations of TBN South Pacific was lost. He therefore did not have as much work to do and because of his minority position on the Board felt that he was being sidelined from many of TBN South Pacific's activities. He was also having trouble with his computer, which took a long time to get fixed. As a result of all these matters, Mr Lingenfelter spent a lot of time at his computer praying, but I note that significant time praying at work was part of the way of doing things at TBN South Pacific.

[11] Mr Sunnex was not only concerned about Mr Lingenfelter's actions as a trustee, but also felt that he was not working to capacity and was trying to undermine Mr Panetta in his new role as head of TBN Australia. Mr Sunnex and Mr Panetta went so far as to raise these issues with Mr Hickey, when they privately canvassed terminating Mr Lingenfelter's employment, but because of Mr Sunnex's personal links with Mr Lingenfelter they decided to take no action. While Messrs Sunnex and Panetta gave evidence that Mr Lingenfelter's activities as trustee had no impact on the decision to dismiss him, the course of events has been such that I do not accept this explanation.

[12] As a result of the loss of the auditing function Mr Lingenfelter was relocated to other duties. He did not complete a number of these to Mr Sunnex's satisfaction, but these were never raised with him. I therefore do not set them out, even although many were raised or referred to in the letter of dismissal.

[13] I do, however, note that it was raised that Mr Lingenfelter had wrongfully brought a young person into the office, but this was consistent with other children being in the workplace from time to time, and the matter was never taken any further at the time.

[14] Mr Sunnex did, however, in December 2008 and January 2009, take up with Mr Lingenfelter his concerns about regular absences, as well as long periods of him apparently sitting at his computer doing no work. Thus on 29 December 2008 Mr Sunnex asked Mr Lingenfelter to account for the time he had taken off during November and December. On 15 January 2009 they met to discuss hours of work again. While Mr Lingenfelter agreed that his regular hours of work had always in reality been 44 per week (not the 40 stated in the employment agreement) and nodded to and failed to disagree with suggestions that he should be shifted on to an hourly rate and that he was to complete weekly timesheets, these matters were not put into writing until the next day, when presented for his signature as part of a new employment agreement.

[15] I accept that Mr Sunnex had no reason at that point to believe formal acceptance would not follow. He accordingly told Mr Lingenfelter to review the document and then to discuss the matter with Mr Panetta while he was away. Mr Lingenfelter went to get advice from a representative (not Mr Ogilvie), but unfortunately this process had not been completed before it was overtaken by events.

[16] As Mr Sunnex was away and he had left Mr Panetta to deal with the issue of the new employment agreement, Mr Panetta rang Mr Lingenfelter on 20 January. Mr Lingenfelter decided he would only discuss the matters with Mr Sunnex.

[17] On 22 or 23 January Mr Sunnex called into the office unexpectedly and had a meeting with Mr Lingenfelter. Mr Lingenfelter was not communicating well with Mr Sunnex in that conversation, but Mr Sunnex soon became aware that Mr Lingenfelter was not happy with the proposed changes to his employment agreement. I note here that one of the changes in the employment agreement was to remove Mr Lingenfelter's entitlement to redundancy compensation should his position be made redundant.

[18] I accept Mr Lingenfelter's concern that he was now being expected to deal with and report to Mr Panetta more formally, and that he had only previously been advised of this in relation to discussions over the new employment agreement. Significant discussion was held over the role of Mr Panetta and the changes that had taken place with the establishment of TBN Australia.

[19] Mr Sunnex told Mr Lingenfelter that he would be replaced as a trustee once his term expired on 31 March 2009. I do not accept that Mr Sunnex gave anything that could be construed as a warning to Mr Lingenfelter, or any other idea that his job was seriously at risk, which is consistent with his own evidence that he *finished that conversation with a hug and my words that we do not want to lose him as an employee, as a team member or as a friend.*

[20] Soon afterwards Mr Sunnex discovered a letter from Mr Lingenfelter (dated a month before) that expressed a number of concerns about his employment situation. Mr Sunnex went back to Mr Lingenfelter and told him that it was best for both parties to reconsider their situation and discuss matters further later.

[21] Within a week, however, Mr Lingenfelter had used his position as a trustee to request a Board meeting over the new employment agreement and the forthcoming replacement of him and the other minority trustee. Mr Sunnex decided that Mr Panetta should speak to Mr Lingenfelter about matters and record the discussion. The recording has not been produced to the Authority.

[22] During that period I accept that Mr Lingenfelter had been made aware again of the requirement to provide timesheets but had not done so, and that he failed to do so thereafter.

[23] In fact Mr Lingenfelter emailed Mr Panetta that day, which proved that he was not refusing to deal with Mr Panetta, and stated amongst other things:

*I am still under the old work agreement as I have not yet signed a new work agreement, therefore because I am not on the new agreement, it is not necessary for me to fill out an hourly timesheet.*

*You have also said to me that I will not be getting paid. Could you please send me an email to confirm that I will no longer be getting paid.*

[24] This email shows that TBN South Pacific were going to enforce its undoubted right to require Mr Lingenfelter to fill in timesheets by not paying him if he failed to do so, an issue not challenged by it.

[25] Mr Panetta's response makes it clear that there are three issues for TBN:

- he was directed to fill in timesheets;
- the process of negotiating his work agreement; and after that was signed
- the agreed salary adjustment.

[26] It was also made very clear that henceforth Mr Lingenfelter was to provide written timesheets, as can be evidenced from the following:

***This email is written confirmation of that official directive that you must provide weekly timesheets.***

*Understand that this is a directive that applies immediately and is not conditional on whether or not you sign the new agreement, rather it is because your employer had previously instructed you to do so (which you had acknowledged).*

[27] Mr Lingenfelter was then asked three questions – whether he had agreed with Mr Sunnex to the changes to his employment agreement prior to receiving the written documentation; agreed with Mr Sunnex that it was *not ethical for you to continue to receive payment for 44 hours per week while ... you ... achieve only something less*

than 40 hours per week; and whether he could recall me asking if you have any concerns about the matters in question.

[28] The email concluded:

*I wait your comprehensive detailed response with your views and opinions and pray that it will bring clarification and peace to any of your concerns.*

[29] Mr Panetta had not received a response by the end of the next working day so he then sent another email, stating amongst things:

*To make things less stressful for you, you are to take special leave until this matter is fully resolved. This leave is at TBN's expense.*

[30] In effect therefore Mr Lingenfelter was being suspended from his employment.

[31] On 10 February 2009 Mr Sunnex emailed Mr Hickey stating the following:

*This is just a "heads-up" to let you know that the Michael and Phil problem is about to explode. Michael has become quite blatant with his false accusations and refusal to submit to leadership ...*

*It seems that, knowing that their window of opportunity is short because they are not expecting to be reappointed as trustees at the end of their current term 31 March, they have been conspiring for some months to contrive a list of complaints about Michael's employment with which to force an urgent meeting of the board with thinly veiled threat of harassing us through the employment court if it does not go their way. Recall the pressure that I said that I was feeling last time we spoke? I did not perceive the nature of the attack at that time, only exasperation that several urgent things had not been accomplished while Michael apparently took a significant amount of undocumented time off during my absence. Also that he was observed to be spending much time just sitting and staring at his computer (he says he was praying.)*

*Michael who is on a fixed salary based on his former work pattern of about 44 hours per week, has been achieving only about 36-38hrs.*

*Rather than risk conflict by confronting him on this we decided to merely update his employment agreement to revert him to an hourly rate and thereby accommodate his actual work pattern. Before I presented him with his new agreement I talked with him about the necessary changes and why – he was agreeable so we expected no trouble.*

*However he now denies that that conversation took place, refuses to talk about it and both he and Phil have written to the board claiming that the presentation of the document was illegally forced on him.*

*It seems that the root of their agenda revolves around aspirations of themselves becoming the key TBN personnel in NZ since Michael talked about a year ago, of his expectation to be promoted to that role when I moved to Australia ... It now seems apparent that both of them have been conspiring for some years to maintain their importance by driving away anyone who could be more competent than themselves at running an office.*

...

*The crux of the accusations that Phil and Michael brought in May was rejection of Alex Panetta to our leadership team. Recently Michael has refused to relate to Alex in his capacity as a Managing Director of TBN Australia and lied about various conversations that he had with both Alex and myself.*

...

*I intend to dis-allow Phil and Michael's demands for a meeting on the grounds that our constitution does not permit the Board to decide anything other than board membership while in a state of disunity (I will also cite other valid reasons why their planned meeting cannot proceed.)*

*Instead I am about to move that Elijah Communications Trust expel them both from membership on the grounds of the provable matters in which they have been in breach of the trust deed's requirements of a Trustee. It is also likely that we will need to terminate Michael's employment – if so, being careful to do so only on the basis of provable untruthfulness and provable refusal to follow legitimate directives.*

...

*I recall that when their attack was reported to you back in May your first reaction was to get rid of them ASAP or they would waste too much time and wear us down.*

*As you know we had some debate about what could have triggered Phil's uncharacteristic behaviour and some concern about his heart condition and so forth so we decided to hold off confronting the issues – a costly mistake.*

*Rule number 1: Terry is always right.*

*Rule number 2: If in doubt refer to rule number 1...*

[32] Obviously Mr Lingenfelter had no insight or input into this process. Mr Hickey must have decided dismissal was necessary because on 20 February Mr Sunnex wrote to Mr Lingenfelter dismissing him with immediate effect with one month's pay in lieu in notice.

[33] Relevant portions of this letter include:

*Dear Michael,*

*With much grief in my heart it is my unfortunate duty to advise that with immediate effect your employment with Trinity Broadcasting Network South Pacific Ltd (TBN) is terminated for cause.*

...

*Since the directive came from USA that we need to terminate your employment, Alex and I have been agonizing before God about how much pain could possibly be spared by minimizing the list of causes and leaving the rest unsaid. However, given the intensity of your conspiracy to shut down Elijah Communications Trust, we feel that the following is the minimum that must be put on record.*

Causes:

- (1) *Your insubordination, and*
- (2) *Your untruthfulness, and*
- (3) *Your involvement in conspiracy and sedition, and*
- (4) *You have rendered yourself unable to carry out your duties, and*
- (5) *Your refusal to submit to correction.*

[34] Soon afterwards, unsurprisingly, Mr Lingenfelter was dismissed from the ECT Board. He subsequently raised a personal grievance, which remains unresolved despite mediation and attempts by the parties to resolve matters during the investigation meeting. It therefore falls to the Authority to make a determination.

### **The Law**

[35] As the Employment Court makes clear in *Air New Zealand v. V* unreported Full Court AC1509, 3 June 2009 the Authority must determine the question of justification on an objective basis and in all the circumstances at the relevant time. The Authority is obliged to judge the actions of the employer against the objective standard of a fair and reasonable employer in terms of what a fair and reasonable employer in the circumstances of the actual employment would have decided, and how those decisions would have been made. This encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision, i.e. dismissal, in the light of that finding. Where the allegations are very serious, such as here where *conspiracy and sedition* are relied on, then the evidence in support of them must be as convincing in its nature as the charge is grave (*Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23 (CA)).

[36] How the employer acted relates to the process undertaken. In *NZ (with exceptions) Food Processing IUW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35 at 45-46 the minimum requirements procedural fairness in dismissal cases were said to consist of:

1. *Notice to the employee of the specific allegation of misconduct to which the employee must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the employee's explanation in the sense that consideration must be free from pre-determination and uninfluenced by relevant considerations.*

[37] Failure to observe any one of these requirements will usually lead to a finding of unjustified dismissal.

### **Determination**

[38] It appears from the timing of events that it was Mr Lingenfelter's role as a trustee, such as in trying to call a special meeting about his employment issues, which led to his summary dismissal. I therefore conclude that it was Mr Lingenfelter's role as a trustee which was of vital importance in his losing his employment with TBN South Pacific, despite TBN South Pacific's evidence to the contrary. Actions as a trustee should not jeopardise an employee's employment, as TBN South Pacific appeared to accept.

[39] Furthermore, despite claiming to have used the Department of Labour's Guide for Employers on Dismissal and the requirements under the employment agreement, TBN South Pacific completely failed to meet any of the minimum requirements set out in *Unilever*. I conclude that the reason for this was that the real reason for his dismissal related to his behaviour as a trustee. I also accept, based on the dismissal letter, that it was Mr Hickey who made the decision (although upon Messrs Sunnex and Panetta's recommendation) to dismiss Mr Lingenfelter, yet it is fundamental to fairness for the dismissed employee to be heard by the decision maker. Again this minimum requirement was not met.

[40] In the absence of any involvement by Mr Lingenfelter in the process and the failure of TBN South Pacific's witnesses to attend personally, it has unsurprisingly been unable to prove any of its serious allegations to the standards required. Mr Lingenfelter was, however, quite wrong to refuse to fill out timesheets. Despite this, after receiving the written directive he never had the opportunity to fill in a timesheet, so while he was wrong to fail to do so beforehand, it can not be said that he had committed serious misconduct, particularly as he genuinely but wrongly believed that because it was not in his employment agreement he did not have to do so (see for example *Sky Network Television Ltd v. Duncan* [1998] 3 ERNZ 917 (CA)). This was a minor failing by Mr Lingenfelter for a very short period and I am sure that if he had received the advice he sought at the time he did, he would not have continued with such an unreasonable approach. As none of the other issues purportedly relied on by TBN South Pacific were ever raised with him at the time, they can not be relied upon to justify dismissal. This is particularly so as he had no input whatsoever in putting his version of events in relation to the many and varied reasons given for dismissal.

[41] Furthermore, for the following reasons, TBN South Pacific can not rely on Mr Lingenfelter allegedly renegeing on an agreement to vary his employment with it as grounds for his dismissal, although it was appropriate for it to seek to negotiate changes given the reduction in Mr Lingenfelter's role following the establishment of TBN Australia. First, it could have sought to enforce such an agreement if it had existed, although that would have been difficult in the absence of agreement in writing. Second, the agreement in writing had been fundamentally changed from what had allegedly been agreed, by the undisclosed removal of Mr Lingenfelter's right to redundancy compensation.

[42] I also accept that it was reasonable of Mr Lingenfelter to prefer, in the circumstances, at least at first, to deal directly with Mr Sunnex, with whom he had had the preliminary discussions about the new agreement, over that matter. In any event he did later discuss such matters with Mr Panetta.

[43] It is clear that for any and all of the above reasons Mr Lingenfelter's dismissal was clearly unjustified.

## **Remedies**

[44] Mr Lingenfelter claims \$10,757.57 gross for lost income he incurred in the first nine months, after taking into account the extra months paid in lieu of notice. As this sum is less than three months pay, because he was able to get a lot of alternative work in that period, he is entitled to be paid it without the need for the exercise of any discretion by the Authority, provided that loss was as a result of the personal grievance. Had Mr Lingenfelter not been unjustifiably dismissed I accept that his employment would most likely have continued for that period. Furthermore, Mr Lingenfelter has been diligent in seeking additional work, but it has essentially been of a casual nature and this has meant that he has suffered losses to the extent claimed. I therefore confirm, subject to contribution, his lost remuneration totalling \$10,757.57 gross.

[45] Mr Lingenfelter was seriously affected by his dismissal from TBN South Pacific. This was more than a job to him and very much a calling. He has suffered greatly accordingly. As he stated in evidence he had difficulties with communications with Church members and has subsequently shifted to a new town as a result. He had a lot of trouble sleeping, was on medication and was very anxious about finding new work. He also stated that he felt his integrity and reputation had been completely shattered by his dismissal. His evidence was confirmed by a friend and fellow trustee, who stated that he went from being an easy going cheerful person to a depressed individual who lost his sense of purpose. Given the undoubted impact the dismissal had on Mr Lingenfelter, compensation in the sum of \$10,000 is appropriate, subject to contribution.

## **Contribution**

[46] In *McAdam v. Port Nelson Ltd (No.2)* [1993] 1 ERNZ 300 the Court held that essential points to contribution are causation and proportionality. It was held at 304 that:

*Misconduct, however bad, which had no bearing upon the situation which gave rise to the personal grievance, cannot be taken into account. The next point is that even if the actions in question had an impact on the situation, any reduction on account of that contribution must be proportionate to it and not by way of punishment for separate acts of misconduct which are the not the subject of the proceeding.*

[47] Any contributory conduct relied on must be proved. Suspicion of such conduct, no matter how strong will not suffice, see for example *Tupu v. Romano's Pizzas (Wellington) Ltd* [1995] 2 ERNZ 266.

[48] Even TBN South Pacific accepted that it should not discipline or dismiss Mr Lingenfelter for his activities as a trustee, yet that is what I have found it did. There can be no contribution in relation to his actions as a trustee. Furthermore, while TBN South Pacific had genuine concerns about his failure to prepare written timesheets and his long periods of inactivity at the computer, while probably praying, these are not matters I find that were actually relied on for his dismissal, but rather were preliminary to the real issue. In any event, they were matters that could have been dealt with by discussion and/or warnings if necessary. No fair and reasonable employer would have dismissed Mr Lingenfelter in these circumstances. Rather, as the employment agreement and the law required, the parties should have discussed them with him with a view to resolving them. Mr Lingenfelter was not to blame for TBN South Pacific's failures in this regard.

[49] Furthermore, Mr Lingenfelter was entitled to pursue his concerns as a trustee and TBN South Pacific elected to terminate his employment without any opportunity for input whatsoever from him. It certainly had no grounds to discipline Mr Lingenfelter for reneging on an agreement it claims to have reached when it provided him with a draft employment agreement that took away his right to redundancy compensation, for instance. These were clearly matters under discussion and Mr Lingenfelter was entitled in law to get advice. Such advice had not been received and/or conveyed to TBN South Pacific when he was dismissed for other reasons. I therefore do not accept that there was any contributory conduct by Mr Lingenfelter.

### **Orders**

I order the respondent, Trinity Broadcasting Network South Pacific Limited, to pay to the applicant, Michael Lingenfelter, the following sums:

- a. \$10,000 under s.123(1)(c)(i); and
- b. \$10,757.57 gross in lost remuneration.

**Costs**

[50] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**