

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 239
5432361

BETWEEN VISHAAL MADANI
 Applicant

A N D CIRROTEC LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Michael Smyth, Counsel for Applicant
 Michael O'Brien and Charlie Piho, Counsel for
 Respondent

Investigation Meeting: 20 and 21 May 2014 at Auckland

Submissions Received: 21 May 2014 from the Applicant
 21 May 2014 from the Respondent

Date of Determination: 17 June 2014

DETERMINATION OF THE AUTHORITY

- A. Cirrotec Limited (Cirrotec) had genuine reasons for terminating Mr Madani's employment for reasons of redundancy.**
- B. Cirrotec failed to follow a fair and proper process and breached its obligations of good faith in terminating Mr Madani's employment. Mr Madani has a personal grievance; he was unjustifiably dismissed or disadvantaged by Cirrotec.**
- C. Mr Madani is entitled to compensation under s.123(1)(c)(i) of the Employment Relations Act (the Act) for the humiliation, loss of dignity and injury to feelings suffered by him as a result of his personal grievance. Cirrotec is ordered to pay Mr Madani compensation in the sum of \$8,500. There was no contribution by Mr Madani to the circumstances giving rise to the personal**

grievance to justify any reduction of compensation under s.124 of the Act.

- D. Mr Madani was not racially harassed in his employment;**
- E. Mr Madani is not entitled to commission on the WEL Networks contract.**
- F. Mr Madani did not breach his obligations of fidelity, confidentiality and good faith to Cirrotec during his employment. Following the termination of his employment Mr Madani did not breach the confidentiality and restraint of trade provisions of his employment agreement.**
- G. Costs are reserved.**

Employment relationship problem

[1] Cirrotec, formerly named Simpl Projects Limited (“Simpl Projects”) is a business consulting company which provides organisations with project consulting, training and resourcing services. More recently, it has extended its services to provide Cloud and mobility solutions for organisations. Simpl Projects changed its name to Cirrotec on 1 February 2013.

[2] Cirrotec has two directors, Mr Andrew Smith, who is also the General Manager, and Mr Milton Bennett Medary, founder of The Simpl Group Limited (“Simpl Group”). Mr Smith and Simpl Group are Cirrotec’s shareholders.

[3] Mr Madani is highly qualified, he holds a commerce degree and a Level 7 graduate diploma in Information Technology. Mr Madani is also experienced in working for multi-national recruitment companies both in the United Kingdom and in New Zealand.

[4] For 18 months before starting at Simpl Projects, Mr Madani was a Resource Manager for the New Zealand division of Kelly Services Limited, a large multi-national recruitment company. Mr Madani was interested in a recruitment role in the IT sector and after seeing a job advertised by Simpl Projects, met with Mr Smith to discuss the Resource Manager position. In May 2012, Mr Madani was offered and

accepted employment by Simpl Projects as its Resource Manager. An Individual Employment Agreement (the employment agreement) was signed by Mr Smith on 28 May 2012 and by Mr Madani on 29 May 2012. Mr Madani commenced employment on 13 June 2012.

[5] Cirrotec is a small business which derives its income largely from revenue from contractors placed by it to undertake various projects for customers and from income generated by Mr Smith from consultancy work undertaken for clients such as Fonterra.

[6] Mr Madani's role was challenging and required that he develop and build up new business. When Mr Madani was employed he believed Simpl Projects to be part of the larger Simpl Group and that there would be preferred supplier contracts in place from which he could develop business. However, it quickly became evident that Mr Madani would not be able to develop business from either of those sources.

[7] By December 2012, Mr Madani and Mr Smith were both frustrated by the lack of new business. Mr Madani offered to resign as he felt he had not performed satisfactorily in the role. Mr Madani and Mr Smith discussed the issues. As a result, Mr Madani did not resign and agreed to work with Mr Smith to move Simpl Projects in a new direction by offering new products and more mobile solutions thereby hoping to increase its business and revenue.

[8] As part of moving Simpl Projects in a new direction, Mr Madani and Mr Smith decided that Simpl Projects needed new office space away from Simpl Group's offices, a new name to differentiate it from Simpl Group and its own website. Accordingly in February 2013, Simpl Projects changed its name to Cirrotec, a name devised by Mr Madani, moved offices and set up a new website.

[9] These changes did not sufficiently improve Cirrotec's financial prospects. With no new contracts being secured, Mr Smith became increasingly concerned about the future of Cirrotec's business. Mr Madani could see that the situation with Cirrotec was not improving and began to look for employment opportunities elsewhere.

[10] In the months between February and May 2013, various discussions were held between Mr Smith and Mr Madani about Cirrotec and its financial outlook, how they could attract and retain new business and what different products could be offered to address the situation. By the end of June 2013, Mr Smith felt the situation had

become critical. Mr Smith's consultancy work was in decline, he was taking steps to increase this work but was concerned this was the only source of Cirrotec's income. Mr Smith formed the view that the current situation could not continue and that immediate steps had to be taken to reduce costs.

[11] Mr Smith called a supplementary Board meeting with Cirrotec's other director, Mr Medary on 28 June to discuss the situation. At the meeting, Mr Smith and Mr Medary determined that Mr Madani's role was no longer sustainable. Upon returning to the office from the Board meeting, Mr Smith told Mr Madani that Cirrotec's financial situation was such that his role could no longer be sustained and was to be made redundant. Mr Madani asked for the opportunity to find another job before being made redundant but Mr Smith told him this was not viable. Mr Madani and Mr Smith discussed Mr Madani's redundancy entitlements.

[12] Almost immediately following this discussion about Mr Madani's redundancy, Mr Smith and Mr Madani both received an email from WEL Networks (WEL), an electricity supplier with which Mr Madani had been negotiating for some months, confirming its approval of a reasonably significant contract with Cirrotec. Upon receipt of the email, Mr Madani spoke with Mr Smith about the need to make his role redundant in the circumstances. A discussion ensued about commission payable on the WEL Networks contract (WEL contract) which developed into an argument. Mr Smith confirmed Mr Madani's redundancy and shortly afterwards provided him with a letter recording the termination of his employment for redundancy. Mr Madani was not required to work out his period of notice and left Cirrotec that day.

[13] Following Mr Madani's departure, Cirrotec and Mr Madani raised various claims against each other. Cirrotec claimed Mr Madani had, during his employment, breached his obligations to it of confidentiality, fidelity and good faith. Cirrotec further claimed breaches by Mr Madani following termination of his employment of the confidentiality and restraint of trade provisions in his employment agreement. Cirrotec claimed the breaches had affected its business. Cirrotec seeks damages and a penalty against Mr Madani in respect of the alleged breaches.

[14] Mr Madani denies Cirrotec's claims and says they were only raised by it to intimidate and discourage him from pursuing his personal grievance claims against it.

[15] Mr Madani's claims against Cirrotec are that he was repeatedly racially harassed by Mr Smith during his employment, is owed moneys for mileage and commission and was unjustifiably dismissed supposedly on the grounds of redundancy. Mr Madani claims the redundancy of his position is not justifiable on either substantive or procedural grounds. Mr Madani seeks remedies against Cirrotec which include lost remuneration as a result of his dismissal, compensation for unjustified disadvantage and unjustified dismissal, commissions allegedly owing to him and penalties. Cirrotec denies the claims.

[16] The parties have attempted to resolve issues between themselves by attending mediation but this has not been successful.

Issues

[17] The issues for determination by the Authority are:

- (1) Was Mr Madani unjustifiably dismissed by Cirrotec specifically:
 - (a) Did Cirrotec have genuine reasons for terminating Mr Madani's employment for reasons of redundancy?; and
 - (b) Did Cirrotec follow a fair and proper process?
- (2) Was Mr Madani racially harassed in his employment by the General Manager, Mr Smith, and does he have a claim of unjustified disadvantage?
- (3) Does Cirrotec owe Mr Madani commission on the WEL contract totalling \$6000?
- (4) Did Mr Madani breach his obligations of fidelity, confidentiality and good faith to Cirrotec during his employment?
- (5) Following the termination of his employment did Mr Madani breach the confidentiality and restraint of trade provisions of his employment agreement?

First Issue : Was Mr Madani unjustifiably dismissed by Cirrotec?

(a) Did Cirrotec have genuine reasons for terminating Mr Madani's employment for redundancy?

[18] The Court of Appeal's statement of the law regarding the genuineness of a redundancy in *G N Hale & Son Ltd v. Wellington Caretakers IUOW¹ (Hale)* was that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[19] However, since *Hale* was decided, the test of justification for dismissal is now as stated in s.103A of the Employment Relations Act 2000 (the Act), as being:

s.103A Test of Justification

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether of a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in sub-section (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[20] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[21] The Employment Court has issued recent decisions in this area which have re-examined the statement of law as set out in *Hale* in light of s.103A of the Act.

[22] In *Michael Rittson-Thomas T/A Totara Hills Farm v. Hamish Davidson² (Rittson)* the Court referred to its previous comments about *Hale* in *Simpsons Farms Limited v. Aberhart³*. His Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however;

¹ [1991] 1 NZLR 151

² (unreported) [2013] NZEmpC 39, 20 March 2013

³ [2006] ERNZ 825, 842

[54] ... *The Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.*

[23] In *Rittson*, the Court was critical of the lack of information provided to the employee, and how the employer had not adequately explained why the monies saved by the disestablishment of the employee's position justified the position being made redundant. The Court found upon analysis that the employer had been mistaken in concluding that there would be a wage saving of 10% per annum, when in fact it was 6%. This *threw into doubt* the genuineness of and, therefore, the justification for, the dismissal.

[24] On 28 June 2013, Mr Madani received a letter from Cirrotec, signed by Mr Smith, confirming termination of his employment by reason of redundancy. The letter stated:

Dear Vishaal

The purpose of this letter is to confirm with you our conversation regarding redundancy from your role at Cirrotec. We have discussed this openly over the last three months, the difficulties we are experiencing and the upcoming cash flow problems.

As a result of the poor business conditions that we are experiencing, your role is no longer needed. Regrettably, this means that your employment will terminate.

Based on your contract terms, we will pay you two weeks redundancy and pay four weeks in lieu of notice. We will pay your outstanding holiday pay and the commission that you would have earned on the Platform sale to WEL Networks of \$1,000.

We have agreed that you will leave today to make you available to look for another role immediately.

Yours sincerely

*Andrew Smith
General Manager*

[25] Mr Smith says that Cirrotec's financial performance was discussed at Board meetings each month and that open discussions about Cirrotec's financial situation were regularly held with Mr Madani. Mr Smith says that he was able to forecast "*cliffs in revenue*" and a very large "*cliff in Cirrotec's revenue was to occur at the beginning of July*". This was in the critical months leading up to, and at the time of, the decision to make Mr Madani's role redundant.

[26] Mr Smith says that with no billable work and no revenue coming in, he forecast losses for Cirrotec in the order of \$25,000 per month from July 2013. Cirrotec's financial reports and forecasts were provided to the Authority which demonstrate that at the end of March 2013, Cirrotec had made a net profit of \$72,238, that from April 2013 to June 2013 Cirrotec made a net operating loss of \$12,952 and for the six months operating period to 30 June 2013, Cirrotec made a net operating loss of \$14,587.

[27] With no contract or revenue forecasted beyond June 2013, Mr Smith says immediate steps had to be taken to address the issue.

[28] Mr Madani and Mr Smith had decided in December 2012 that a change in direction was necessary to address Cirrotec's struggling financial position. However, despite the change in direction, Cirrotec's financial position did not improve. Mr Madani and Mr Smith regularly discussed how they could conduct the business in a way which would attract more revenue. Mr Madani was aware of the situation and began considering other employment opportunities.

[29] The Minutes of the Board meeting held on 2 May 2013 confirm that there was a poor forecast for Cirrotec and that there had been a drop off in contractor work and Mr Smith's billing work. These factors were affecting Cirrotec's profits. The Minutes record:

April P & L Notes:

- *A poor result due to low billable work for AS (Mr Smith) and declining contractor numbers.*

[30] On 28 June 2013 a supplementary Board meeting was held. The Minutes record:

AS initiated a meeting to discuss short term profitability of Cirrotec. Short term prognosis is very poor with no ongoing contractor revenue beyond the end of June and no solution work closed. Business is being funded by AS performing billable work.

Agreed immediate action;

- 1. Exit Vishaal's cost asap to reduce fixed monthly salary cost*
- 2. Review any other OPEX cost reduction*
- 3. AS maintain billable work in the short term to fund current operation*
- 4. Enter a holding pattern and review over next 2-3 months approach going forward.*

[31] I find that Cirrotec's business was not achieving the level of income required to be profitable and the forecast from July 2013 indicated significant losses. Cirrotec's directors, Mr Smith and Mr Medary, determined that immediate steps were required to address Cirrotec's financial situation. The immediate step decided upon was to remove the cost of Mr Madani's role.

[32] Cirrotec was entitled in my view to consider that Mr Madani's role could not be sustained from July 2013, on economic grounds. It is my view that a fair and reasonable employer could in the circumstances determine that to reduce costs, Mr Madani's position was to be made redundant.

[33] Mr Madani claims there were mixed or ulterior motives which played a part in his dismissal for redundancy. Mr Madani points in support of this claim to a pattern of racial harassment during his employment which he says he was subject to, because he was Indian.

[34] Dealing firstly with the allegation by Mr Madani that his redundancy was for an ulterior motive, because he was Indian. I do not accept this claim to have any merit. Mr Smith was aware Mr Madani was an Indian when he employed him, it does not make sense that he would wish to then dismiss him on the basis of his race. Further, Mr Smith supported Mr Madani during his employment by Cirrotec when his wife became ill with depression and when he also became ill with depression. The depression suffered by Mr and Mrs Madani had nothing to do with Mr Madani's employment, in my view. The email correspondence between Mr Madani and Mr Smith confirms that the reasons for Mr Madani's depression included his wife's

depression and their decision to come to New Zealand to live. There was no evidence in my view to support Mr Madani's allegation that he was dismissed because of his race and not because of Cirrotec's financial circumstances.

[35] I do not accept that there was sufficient evidence to establish that Cirrotec had ulterior or mixed motives to dismiss Mr Madani. Cirrotec had genuine concerns about the viability of its business, that is what led to Mr Madani's redundancy. Mr Madani's role has not been replaced since the termination of his employment on 28 June 2013. Cirrotec's business is now being operated by Mr Smith from his home. The answer to Issue (1) (a) is "Yes".

(b) *Did Cirrotec follow a fair and proper process?*

[36] An employer who is proposing to terminate an employee's position for redundancy must not only have genuine reasons for doing so but must follow a fair procedure.

[37] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) is particularly relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

- (i) *Access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *An opportunity to comment on the information to their employer before a decision is made.⁴*

[38] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that it has complied with the statutory obligations of good faith dealing in s.4 of the Act. His Honour Judge Couch in *Jinkinson v. Oceana Gold (NZ) Ltd*⁵ noted in para.[40] that:

Sub-section (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process.

⁴ Section 4(1A)(i) and (ii)

⁵ [2010] NZEmpC 102

[39] His Honour Chief Judge Colgan in *Simpson Farms Ltd v. Aberhart*⁶ noted that this compliance with good faith dealing includes consultation *as the fair and reasonable employer will comply with the law.*⁷

[40] Prior to any discussion with Mr Madani about the disestablishment of his position as Resource Manager, it is clear that Mr Smith and Mr Medary had determined at the supplementary Board meeting on the morning of 28 June that Mr Madani was to be made redundant. Up until that point, Mr Madani and Mr Smith had regularly discussed Cirrotec's financial situation and Mr Madani had taken precautionary steps as someone in his position quite sensibly would do, to look for alternative employment. However, in my view these discussions were not focussed on redundancy but rather on improving Cirrotec's business performance.

[41] Mr Madani was never provided with Cirrotec's financial reports or forecasts to comment on. Further, Mr Madani was not informed that the Board, at its monthly meetings, was considering Cirrotec's poor financial position, and the reasons for it. Mr Madani was never given the opportunity to address the Board on issues which may affect its financial position and the consequences for his employment. These omissions by Cirrotec in my view, constitute breaches of its good faith obligations under the Act.

[42] Finally, Mr Madani was not given the opportunity to address the Board prior to its meeting on 28 June at which time his position was considered and a decision made to "*exit [his] cost ASAP...*" This failure in my view, is a further breach by Cirrotec of its duty of good faith to Mr Madani as specified in s4(1A)(b) of the Act, to be "*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative....*" The communication with Mr Madani about the possibility his role may be in jeopardy because of Cirrotec's poor financial situation, was entirely inadequate.

[43] When Mr Smith met with Mr Madani immediately following the Board meeting on 28 June it is my finding that he presented redundancy to Mr Madani as a *fait accompli*. The Board minutes of 28 June, in my view make this clear. Mr Madani

⁶ [2006] 825, 842

⁷ Ibid at para.[40]

attempted to persuade Mr Smith to give him time to obtain a job before he was made redundant but this proposal was not acceptable to Mr Smith who said Cirrotec could not afford that option.

[44] Mr Madani was therefore deprived in my view, of the opportunity to provide feedback on the economic factors or financial justification leading to the termination of his position. Mr Madani was also deprived of the opportunity to discuss alternatives to his redundancy. I find Cirrotec failed to follow a fair and proper process in making Mr Madani redundant and failed to comply with the obligations of good faith in s4(1A) of the Act.

[45] Terminating employment with an accompanying material breach of the Act, is not the action of a fair and reasonable employer. I find that, viewed objectively, Cirrotec's actions in this regard and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. I consider the grievance in this case to be one of unjustified dismissal or unjustifiable action to the disadvantage of Mr Madani in his employment. I consider the way in which the grievance is framed makes little difference in terms of the remedies that Mr Madani is entitled to in the circumstances. The answer to Issue (1) (b) is "No".

[46] Turning now to appropriate remedies. In cases of genuine redundancy but where there has been a procedural failure rendering the dismissal unjustified, the amount of lost wages is limited because the resulting loss has not been caused by the personal grievance. Mr Madani's role has not been filled and Mr Smith is operating Cirrotec's business from his home. Mr Madani was paid 2 weeks redundancy pay and 4 weeks pay in lieu of notice. Mr Madani was also paid \$1000 commission that would have been earned on the WEL Networks contract. This was paid by Cirrotec over and above what it believed it was legally obliged to pay Mr Madani, in recognition of his work on that contract.

[47] The procedural failures and the breaches of good faith by Cirrotec in its dealing with Mr Madani were serious in my view and compensation to Mr Madani for

the stress he has suffered is to reflect this. I order Cirrotec to pay Mr Madani the sum of \$8,500 compensation in respect of his personal grievance pursuant to s.123(1)(c)(i) of the Act. I am required under s.124 of the Act to consider whether Mr Madani contributed to the circumstances giving rise to the personal grievance. I am satisfied that he has not.

Second Issue: Was Mr Madani racially harassed in his employment by the General Manager, Mr Smith, and does he have a claim of unjustified disadvantage?

[48] Mr Madani claims he was taunted during the course of his employment by Mr Smith on hundreds of occasions, because he was Indian. Mr Madani says the racial harassment was one of Mr Smith's motivations for dismissing him supposedly for redundancy. I have rejected this claim. Mr Madani also claims he has a distinct unjustified disadvantage claim because of the alleged racial harassment.

[49] Section 103(1)(e) of the Act provides that racial harassment can give rise to a personal grievance claim. Section 109 states:

*“...an employee is **racially harassed in the employee's employment** if the employee's employer or a representative of that employer uses language(whether written or spoken), or visual material, or physical behaviour that directly or indirectly-*

- (a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and*
- (b) is hurtful or offensive to the employee(whether or not that is conveyed to the employer or representative); and*
- (c) has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.”*

[50] I do not accept the alleged statements were made by Mr Smith. I found Mr Madani's evidence on this matter to be inconsistent and exaggerated. Mr Ketan Patel, one of Mr Madani's witnesses and who was contracted to undertake a project for Cirrotec for a short period of time says he never saw or heard any racial harassment of Mr Madani by Mr Smith. That of course does not mean Mr Madani was not racially harassed. However, I did not find Mr Madani's evidence regarding racial harassment convincing and I do not accept Mr Smith made the statements alleged by Mr Madani.

[51] Further, at no stage during his employment did Mr Madani raise any issues concerning racial harassment, even though he says he was being racially harassed shortly after commencing employment. Mr Madani says the first time he became aware that Mr Smith had been racially harassing him was at a counselling session after the termination of his employment. Mr Madani says his counsellor described Mr Smith as a “sociopath” who had been “bullying and racially harassing” him. Mr Madani did not raise this grievance with Cirrotec until approximately 6 weeks following the termination of his employment.

[52] Counsel for both parties accept that all of the allegations of racial harassment with the exception of one statement supposedly made by Mr Smith after Mr Madani’s employment was terminated, occurred outside the 90 day period within which such claims are to be raised under the Act. Mr Madani did not seek leave to raise the grievances out of time. With regard to the final statement allegedly made, if it was made by Mr Smith and I do not accept it was, it was made after Mr Madani’s employment had been terminated when he was no longer an employee.

[53] I reject the claims by Mr Madani that he was subjected to racial harassment by Mr Smith while employed by Cirrotec. I do not accept the claim of unjustified disadvantage. The answer to Issue (2) is “No”.

Third Issue : Does Cirrotec owe Mr Madani commission on the WEL contract totalling \$6000?

[54] In his statement of problem, Mr Madani seeks “*reimbursement of unpaid commission of \$6,000 in respect of the WEL Networks contract*”.

[55] Clause 1.1 of the employment agreement states:

We both wish to enter into an employment relationship, the terms of which are contained in this agreement, the attached schedule and the Simpl Projects HR Policies.

[56] Clause 31 of the employment agreement contains a declaration by Mr Madani that he understands and accepts the conditions of his employment as contained in the employment agreement. Mr Madani further accepts in the declaration, being given the opportunity and entitlement to take independent advice in respect of the employment agreement.

[57] Mr Madani was provided with Cirrotec's employment policies and the commission policy entitled "Simpl Projects Commission Scheme FY13" prior to signing the employment agreement on 29 May 2012.

[58] Clause 4.1 of the Commission Scheme states:

Sunrise/sunset. This Scheme will take effect from 1 April 2012. It will be reviewed annually as part of the business planning process. Simpl Projects retains the right to revise or terminate the scheme for any reason.

[59] Clause 4.9 is the relevant clause in relation to calculation of commission payments. This clause states:

The calculation is based on the Gross Margin achieved per placement. The individual will receive 15% of the achieved Gross Margin unless otherwise agreed as per clause 6.3.

[60] Clause 6.3 states:

Simpl Projects reserves the right to alter the terms of the commission scheme as it deems necessary or appropriate. In most cases this will be after a process of consultation with the incentive scheme participants but this may not always be the case.

There may be some particular sales made that are unusual in the manner in which they are made or in which the commercial terms are significantly different to Simpl Projects' normal terms and conditions. In these cases it may be necessary for Simpl Projects to vary the commission scheme to reflect the unusual nature of the sale. For instance a very large sale may be made at significantly reduced margins for strategic reasons and it may involve sales input from a wide group of Simpl Projects staff.

In all of these cases it is intended that any changes to the terms of the commission scheme will be discussed with the individual concerned and agreed before the sale is closed. If agreement cannot be reached, Simpl Projects will, having due regard to the individual's comments, make a decision on the commission to be paid and advise the person accordingly.

[61] Clause 5.5 provides that in the event of redundancy, an employee eligible for commission shall be entitled to receive a pro rata commission entitlement for the month of redundancy based on the number of business days employed for that month.

[62] Mr Madani claims that the WEL contract was approved on the day of his redundancy, being 28 June 2013 and therefore he is entitled to payment of the commission. The question is whether or not Mr Madani was entitled to commission which he calculated as amounting to \$6000.

[63] The email from WEL on 28 June 2013 states:

I am pleased to inform you the WEL mobility project business case has been approved by the Executive. We now need to firm up the project delivery time lines and scope of works and sign the contract. I will be in touch next week to discuss the way forward. Do you have a standard contract for this work? ...

[64] A contract was not signed by Cirrotec and WEL until 5 August 2013 and Cirrotec was not due to receive the first payment under the contract until 20 August 2013.

[65] Mr Smith says commission under the commission scheme was only payable on gross margin achieved per placement not on sales closed. In other words, commission was paid on income from a sale received by Cirrotec. It is my finding that the plain wording of the commission scheme is clear.

[66] Clause 4.9 states that the calculation of a commission payment is based on the gross margin achieved per placement. The next sentence refers again to “*achieved gross margin*”. There was no agreement altering the commission scheme as contemplated by clause 6.3.

[67] As stated in *Terson Industries Ltd v. Loder*⁸ the approach taken by the Employment Court when considering a dispute about the interpretation and operation of an employment agreement, the Court applies normal contractual principles of interpretation but does take into account the special features of employment relationships. Judge Shaw in that case stated that the approach to interpretation was first, to take an objective approach and, secondly, that the starting point is the words written in the agreement.

[68] I accept Mr Smith’s evidence that Cirrotec paid commission when income from the sale was actually received by Cirrotec. The contract was not signed for some six weeks following Mr Madani’s termination of employment. Indeed, at any time between the date of Mr Madani’s termination on 28 June and the signing of the contract on 5 August the situation may have changed and WEL may have withdrawn its approval or there may have been issues around the scope of works which resulted in no contract between the parties. In any event, I accept Ms Smith’s evidence that

⁸ (2009) 6 NZELR 345 at para.21

commission was not payable until income was received by Cirrotec which in this instance was not until 20 August and was only the first payment under the WEL contract.

[69] I find that Mr Madani is not entitled to commission on the WEL Networks contract. The answer to Issue (3) is “No”.

Fourth issue - Counterclaim

Did Mr Madani breach his obligations of fidelity, confidentiality and good faith to Cirrotec during his employment and breach his obligations of confidentiality following termination of his employment?

(a) By setting up a competing business?

[70] Cirrotec accepts that it has not provided sufficient evidence to show damage caused by Mr Madani’s alleged breaches of his confidentiality and restraint obligations but seeks a declaration that Mr Madani has breached his employment agreement and a penalty. Mr Madani denies the claims.

[71] Cirrotec alleges that during his employment by it, Mr Madani established RapidCloud Limited (RapidCloud) as a business offering substantially the same products and services as Cirrotec. RapidCloud was the new name for a company Mr Madani had established on 25 October 2011 and which was known as One Business Limited, (One Business). One Business changed its name to RapidCloud on 1 July 2013.

[72] Emails between Mr Madani and a Mr Lee Tyrrell dated in June 2013 and during the course of Mr Madani’s employment with Cirrotec were produced by Cirrotec and appeared to suggest that Mr Madani was doing work on RapidCloud’s website or on Mr Tyrrell’s website during company time. It became clear during the investigation meeting that Mr Madani had been assisting a previous colleague at Kelly Services Limited with the setup of his website, not RapidCloud’s website. The number of emails was minimal. No damage was established.

[73] Cirrotec claims Mr Madani emailed a list of Cloud based products to Mr Patel’s personal email and a link to Cloud ERP solutions to his personal email account during his employment by Cirrotec. Mr Patel says as a contractor, he used his personal email primarily when working at Cirrotec. Mr Madani says he often worked

from home and so would email work to his personal email address. There was insufficient evidence to establish these actions constituted breaches by Mr Madani of his obligations of fidelity, confidentiality and good faith. There was no evidence of resulting financial loss by Cirrotec.

[74] In regard to the allegation by Cirrotec that Mr Madani removed its confidential information, Mr Madani says, and this was borne out in various emails produced to the Authority, that he had some flexibility in his role to work from home, and often did. In those circumstances, he would often use his personal Drop box account in order to access work documents. Mr Madani also says that there may be any variety of reasons for the Drop box account to update itself, it does not necessarily mean that documents have been transferred into the Drop box account on the particular date on which the update is made.

[75] Mr Madani, through counsel, responded immediately when these allegations were first made against him by Cirrotec in August 2013. In his letter of 5 September, Counsel for Mr Madani confirmed that Mr Madani had none of Cirrotec's confidential information in his Drop box folder and that all Cirrotec's confidential information in his possession had been deleted. An undertaking was also given on behalf of Mr Madani to abide by the obligations in his employment agreement. In my view, based on the evidence provided, Mr Madani was not in breach of his obligations to Cirrotec. In any event, insufficient evidence was produced by Cirrotec to show any resulting damage.

[76] A further allegation by Cirrotec relating to Mr Madani's alleged breach of his obligations of fidelity, confidentiality and good faith was that Mr Madani had solicited Mr Patel a consultant engaged by it, to work for RapidCloud. Similarly, there was insufficient evidence to support this claim. Following Mr Madani's termination, Mr Patel initiated contact with Mr Madani via *Linked In*. Mr Patel did not have a signed contract with Cirrotec he had been undertaking some work for Cirrotec but it was minimal. Mr Patel became a Director of RapidCloud on 31 July 2013 but resigned on 19 August. It is my finding that Mr Madani did not solicit Mr Patel to work for RapidCloud, Mr Patel initiated the contact. Accordingly, I do not find that Mr Madani was in breach of his obligations of fidelity, confidentiality and good faith and there was no evidence of damage. The answer to Issue (4) is "No".

Fifth Issue : Following the termination of his employment did Mr Madani breach the confidentiality and restraint of trade obligations contained in his employment agreement?

[77] Clause 15 of the employment agreement states:

15.2 You should not remove or copy any information, including client/customer information, from our premises without our consent.

15.3 The restrictions contained in the sub-clauses above do not apply to:

- The use of disclosure of such information in the normal course of your duties; and*
- Information that has already become public knowledge, other than as a result of a breach of this clause by you.*

15.4 The restrictions contained in the sub-clauses above apply both during the term of this agreement and after the expiry of the agreement.

15.5 You should not at any time or for any reason, whether during the term of this employment or after its termination, use or disclose to any person any confidential information relating to our information or trade secrets except so far as may be reasonably necessary to enable you to fulfil your obligations under this agreement.

...

15.7 You should not disclose any confidential information to any other person who is not authorised to receive it. You should not use any confidential information relating to our business, or information gained through your employment, to your own benefit, as distinct from our benefit.

...

15.9 You should not use or attempt to use any confidential information in any manner, which may expose us to injury, liability or cause loss (potential or actual) whether directly or indirectly to us.

15.10 During the course of employment or after termination of employment with us, you shall not directly or indirectly make a record of, or divulge, or communicate to any other person, any information regarding our business or any matters associated with us.

[78] Cirrotec alleges that after Mr Madani's termination, it accessed his company laptop and discovered that Mr Madani had moved confidential company information into his personal Drop box account. Documents included client lists, folders, business presentations and the profile of a contractor. As above, I do not accept this claim to have been made out by Cirrotec.

Restraint of trade

[79] Clause 26 of the employment agreement provides in respect of restraints as follows:

26.1 You shall not at any time during the term of this agreement, and for a period of six months after the termination of employment with us, establish, purchase, or obtain an interest in, either directly or indirectly, any business related in any way to ours, within a radius of 100 kilometres, without our express written consent.

26.2 You shall not at any time during the term of this agreement, and for a period of six months after the termination of employment with us, undertake work, either directly or indirectly, with any client, customer or prospective customer of ours with whom you have previously associated whilst in our employ.

26.3 You shall not at any time during the term of this agreement, and for a period of six months after the termination of employment with us, approach or solicit our staff or contractors either directly or indirectly, to leave our employ or in any way undertake activity which conflicts with our interests or entices away from us, or discourage from being employed by us, any other employee or actual client/customer or prospective client/customer of ours. ...

[80] The restraint of trade provision expired on 28 December 2013.

[81] No evidence of damage has been provided by Cirrotec arising out of the alleged breach of the restraint. In any event, I do not accept that RapidCloud was operating in a manner which was in breach of the restraint.

[82] I reject the claims by Cirrotec that Mr Madani breached his obligations of fidelity, confidentiality and good faith to Cirrotec during his employment and subsequently. I also reject Cirrotec's allegations that following the termination of Mr Madani's employment, he breached the confidentiality and restraint of trade obligations.

[83] No damages arose and I am not prepared to impose a penalty in the circumstances. The answer to Issue (5) is "No".

Costs

[84] Costs are reserved. As the largely successful party, Mr Madani has 14 days from the date of this determination to file a memorandum as to costs. Cirrotec has 14 days in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority