

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jonathan Manning (Applicant)
AND Saxon Print Group Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Blair McDermott, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 6 December 2005
DATE OF DETERMINATION 13 February 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Jonathan Manning, worked for the respondent as an account manager from May 2001 until he was dismissed from his employment on 2 May 2005. Mr Manning was told that he would be paid until the end of May 2005 and was also given the use of a company vehicle.

[2] The respondent, Saxon Print Group Limited (“Saxon Print”) is a print company. The managing director of Saxon Print is Blair McDermott.

[3] Mr Manning says that his dismissal was unjustified. He accepts his sales figures were down from the previous year from April 2004 to April 2005, but says there were reasons for that beyond his control.

[4] Mr Manning said that there were production issues within Saxon Print which resulted in errors and late delivery of work to his clients. These factors, he said, caused a loss of repeat business from his clients and the production issues meant it was more difficult for him to grow his client base. Mr Manning also said that a change in direction from early 2004 for Saxon Print regarding the type of clients that would be pursued, with an emphasis on magazine productions, impacted on Mr Manning’s client base of which a considerable proportion was advertising agencies.

[5] Mr Manning also says that the respondent did not follow the procedure in the written individual employment agreement he had with the respondent dated 24 May 2004 in terminating his employment.

[6] Mr Manning was unemployed for 11 weeks after 2 May 2005. He was paid by Saxon Print for two of those weeks although Mr McDermott stopped further payment once a personal grievance was raised in a letter from Mr Goldstein. Mr Manning then found employment however was paid

\$252 a week less than he was receiving when he was employed by the respondent. It took Mr Manning a further 14 weeks to find a sales representative role with another printing company.

[7] Mr Manning seeks recovery of lost wages for nine weeks at \$852 per week in the sum of \$7668.00 gross. He also seeks recovery of the underpayment for 14 weeks of \$252.00 in the sum of \$3528.00 gross. He also seeks compensation in the sum of \$30,000.00 together with costs.

[8] Saxon Print does not accept that Mr Manning was unjustifiably dismissed from its employment. It says that a production bottleneck did not exist for the entire year but that the difficult months for meeting deadlines are confined to October, November and December.

[9] Whilst Saxon Print accepts that major plant investment did give the company an opportunity to explore new markets it does not accept any suggestion that the existing market including advertising agencies was to be ignored. The company relies on the fact that the three other account managers at the company were growing their sales during the same period.

[10] Saxon Print says that there were regular discussions about Mr Manning's declining monthly sales results and the company felt that it underwent a fair process in dealing with him. It says that given the state of sales and work in progress for and following the month of April there was no option to termination of Mr Manning's employment in May 2005. Saxon Print says that the termination of Mr Manning's employment was justifiable.

The Issues

[11] Was Saxon Print justified in dismissing Mr Manning for poor work performance? This requires consideration as to whether the dismissal and the process adopted by Saxon Print was what a fair and reasonable employer would have done in the particular circumstances of this case. Justification for the dismissal must be considered in light of the statutory test for justification set out in section 103A of the Employment Relations Act 2000.

[12] If Mr Manning is found to have been unjustifiably dismissed, are there any issues with respect to contribution on his part?

Reason for termination

[13] The reason for Mr Manning's termination was contained in a letter to Mr Goldstein from Mr McDermott dated 23 May 2005 following a request for reasons. Mr McDermott said in his letter that:

I had become increasingly concerned about his declining sales figures and his inability to improve the situation. This was discussed at the end of each month from October last year.

Jonathan was well aware of my concern for the situation, he even discussed how worried he was with fellow staff.

His performance continued to decline this year until finally I lost my patience because the sales in April were so bad (25% of budget, a 1/3 of last year).

[14] The reason for Mr Manning's termination was because of the declining sales figures and therefore dissatisfaction with his performance.

Was there genuine dissatisfaction with Mr Manning's sales figures?

[15] I accept that Mr McDermott was genuinely dissatisfied with Mr Manning's sales figures for the 2004/2005 year and started to have serious concerns in October 2004. The previous year Mr Manning had made sales in excess of one million dollars. In 2004 Mr Manning only matched or exceeded the previous year's monthly figures during the month of April 2004. His total sales from 1 April 2004 to 31 March 2005 were \$270,816.30 less than the previous year.

What steps did Mr McDermott take to address the declining sales with Mr Manning?

[16] There were discussions between Mr Manning and Mr McDermott about sales and what was coming up together with general business during weekly meetings for sales managers. Mr McDermott and Mr Manning also met one on one once a month to discuss the previous month's sale figures. Mr Manning said that both he and Mr McDermott were frustrated at the figures. It was important for Mr McDermott to see the sales grow and it was also important for Mr Manning to do well because he was paid generous monthly commissions on his sales.

[17] Mr Manning said he probably should have spoken to Mr McDermott earlier than he did about the effect of the production issues on his figures. He said that he did not initially bring the issues up because he thought Mr McDermott was aware of them.

[18] Mr McDermott recalled Mr Manning raising the impact of production issues on his figures during meetings in November and December 2004 but said that Mr Manning knows that production is delayed during these months even with good planning.

[19] Mr McDermott said that the discussions between him and Mr Manning went to a new level in January 2005. He said that he informed Mr Manning if things did not improve and there was not a complete turnaround from declining sales than he would lose his patience and Mr Manning's job would be at risk. Mr Manning said that he felt he would have remembered those comments if they had been made. Mr Manning said that at one meeting, but he could not be specific about which, Mr McDermott did tell him *this can't go on*.

[20] I accept Mr Manning's evidence that he did not recall being warned clearly that his position was at risk in January 2005. I found him to be a straightforward witness. I have no doubt he knew that Mr McDermott was concerned with the situation. I find it more probable than not that Mr McDermott did make a comment along the line of what Mr Manning recalled that *this can't go on*. The January meeting was to discuss the December 2004 figures. The actual sales for the month of January were quite close to the previous year's figures so it probably looked as if things may be picking up when the one on one February meeting took place.

[21] Mr Manning also said that there was some confidence shown in him during the one on one meetings in the months of January, February and March 2005 that he could turn things around. There was some new work in the pipeline which potentially looked promising and Mr Manning had produced excellent sales in the past.

[22] For the month of April 2005 however Mr Manning's figures were well down.

[23] Clause 24 of Mr Manning's individual employment agreement contains a full procedure for dealing with disciplinary issues.

[24] Subclause 24.1 refers to the employee being given a reasonable opportunity to improve before a formal disciplinary process is entered into. A verbal reprimand may be part of this. The clause recognises that it may be appropriate in some cases to move directly to the formal procedures.

[25] If there is a warning to be issued subclause 24.4 provides that it is to be formally and clearly issued and confirmed in writing. It is to advise of any corrective action required and the consequence of continued substandard job performance.

[26] I accept that there was what could be described as a verbal reprimand at one of the meetings probably in January 2005 in terms of subclause 24.1. I am not satisfied that it could be considered a clear and explicit warning that Mr Manning's job was on the line if there was no improvement in performance as required by subclause 24.4. A warning in terms of that clause would have given Mr Manning clear information about what was required the following month and the months thereafter so that performance could be assessed regularly, together with the consequences of not increasing the sales.

[27] In conclusion therefore I find that although Mr McDermott was dissatisfied with Mr Manning's performance, the process did not move until 2 May 2005 from a review of sales figures each month and discussion about what was coming up the following month to the commencement of a disciplinary process to deal with issues of non performance. Mr McDermott wanted to see better sales results from Mr Manning but that did not transform the meetings to disciplinary in nature.

Dismissal on 2 May 2005

[28] Mr McDermott said that it was only during the meeting on 2 May 2005 that he decided to dismiss Mr Manning. Contrary to the disciplinary process set out in subclause 24.3 Mr Manning was not advised to have a support person at that meeting and he was not advised that a consequence of the meeting could be dismissal. Mr Manning did put forward some explanations for the decline in his sales at that meeting.

[29] The explanations were similar to those advanced at the one on one meetings. Mr Manning spoke about some jobs that had been lost because of production/delivery issues and that he needed to do some delivery and production errands himself and these took up time. There was evidence provided at the investigation meeting of client dissatisfaction both in terms of times for delivery and the standard of the work produced. Some clients took their business elsewhere because of reasons that appeared out of Mr Manning's control.

[30] Mr McDermott said to me that he did not accept Mr Manning's explanations. There is no evidence though to suggest careful analysis of the explanations took place prior to dismissal. I do not know for example what proportion of clients left for reasons of dissatisfaction outside of Mr Manning's control and what impact that had on Mr Manning's figures.

[31] There was some discussion about work in progress but Mr Manning said he was unable to think clearly on this matter and give a full answer. Some jobs were mentioned but it seems that only one of these jobs was carried out by Saxon Print after Mr Manning's dismissal. Mr McDermott made a decision at the meeting that Mr Manning *had to go*. He felt that Mr Manning couldn't see any light at the end of the tunnel and Mr McDermott could not see a way forward. Mr Manning was duly dismissed from his employment

[32] Mr McDermott was aware of Mr Manning's personal circumstances and that is why he offered to pay him until the end of May and agreed that because he did not have his own vehicle Mr Manning could use the company vehicle.

Determination

[33] Mr McDermott lost patience with Mr Manning's performance and dismissed him on 2 May 2005. He did so before there had been a proper disciplinary process including warnings in breach of Mr Manning's individual employment agreement and without the minimum requirements of procedural fairness. For completeness I have considered whether subclause 24.7 of the individual employment agreement would have been applicable. That subclause could be read to suggest that where substandard work performance is considered serious enough there could be dismissal without preceding warnings. I do not find that a fair and reasonable employer would have dismissed Mr Manning without a fair process including warnings in the circumstances of this case.

[34] It was perfectly open to Mr McDermott to commence a formal disciplinary process in January 2005 or later in terms of the employment agreement. Mr Manning, after a fair and reasonable process including consideration of his explanations with respect to his performance, may have kept or lost his job.

[35] There was no such fair process. Mr Manning was unjustifiably dismissed from his employment and he has a personal grievance and is entitled to remedies.

Remedies

Contribution

[36] I am required to consider under section 124 of the Employment Relations Act 2000 the extent, if at all, that Mr Manning contributed to the events that gave rise to the grievance.

[37] I accept that Mr Manning's sales figures were lower than previous years and caused Mr McDermott dissatisfaction. The answer to that though was for Mr McDermott to undertake a fair and reasonable process in accordance with Mr Manning's employment agreement. The ability to do so was in his control. Unfortunately he did not undertake such a process. That is the reason for the personal grievance. I do not in the absence of such a fair process find that Mr Manning has contributed to the events that gave rise to the grievance.

Lost Remuneration

[38] I am satisfied that Mr Manning made satisfactory attempts to find alternative employment. Mr Manning has sought a sum greater than three months ordinary time remuneration. I do have discretion under section 128(3) of the Act to order that Mr Manning be paid a sum greater than three months. In this case the evidence was that there was not a lot of work in progress for Mr Manning as at 2 May 2005. His employment may well not have continued beyond three months. I intend therefore not to order payment of a sum greater than three months lost remuneration. Three months lost remuneration is calculated on the following basis. Nine weeks at \$852.00 which is a total of \$7668.00 gross and four weeks with a shortfall of \$252.00 per week which is \$1008.00 gross. The combined amounts for lost remuneration for a three month period are \$8676.00 gross.

[39] I order Saxon Print Group Limited to pay to Jonathan Manning the sum of \$8676.00 gross being reimbursement for lost wages under section 123 (b) of the Employment Relations Act 2000.

Compensation

[40] Mr Manning is a pleasant and polite man. I noted that he thanked Mr McDermott at the end of the meeting on 2 May 2005 for the short term loan of a company vehicle. Mr Manning had previously performed well for Saxon Print in his sales. I find that although Mr Manning did not react emotionally during the meeting his unexpected dismissal had a serious impact on him. He was worried about his future in the printing industry and given the unexpected dismissal did not know how he would cope financially particularly given his shared custody arrangements and limited financial reserves. Mr Manning thought that his dismissal would count against him in other printing sales positions. I take into account that Mr McDermott did offer to continue paying Mr Manning until the end of May although that arrangement stopped after two weeks, and loaned Mr Manning a vehicle. Mr Manning gave evidence that he went backwards financially and got into debt which he is only now paying off. Mr Manning was unemployed for quite a long period.

[41] In all the circumstances of this case and given the absence of a fair process which would have minimised the feelings of shock and dismay I am of the view that a suitable amount of compensation would be \$9000.00.

[42] I order Saxon Print Group Limited to pay to Jonathan Manning the sum of \$9000.00 without deduction being compensation under section 123 (c) (i) of the Employment Relations Act 2000.

Costs

[43] I reserve the issue of costs. I would encourage the parties to reach agreement failing which the applicant has 14 days from the date of this determination to lodge and serve submissions as to costs. The respondent has a further 14 days from receipt of those submissions to lodge and serve submissions in response.

Summary of orders made

- I have found that Mr Manning was unjustifiably dismissed.
- I have ordered that Saxon Print Group Limited pay to Mr Manning the sum of \$8676.00 being reimbursement of lost wages for a three month period under section 123 (b) of the Employment Relations Act 2000.
- I have ordered that Saxon Print Group Limited pay to Mr Manning the sum of \$9000.00 being compensation for humiliation, loss of dignity and injury to feelings under section 123 (c) (i) of the Employment Relations Act 2000.
- I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority