

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Young Joo (Abraham) Park (Applicant)
AND Creative Business Systems (Respondent)
REPRESENTATIVES Glenn Finnigan, for Applicant
Peter Elder, for Respondent
MEMBER OF AUTHORITY Ken Raureti
INVESTIGATION MEETING 26 November 2004
FURTHER INFORMATION & SUBMISSIONS RECEIVED 9 December 2004
DATE OF DETERMINATION 4 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Creative Business Systems Limited is a small technology company that has developed computer software and hardware which is used for measuring the internal diameters of underground water and wastewater pipes. Mr Park was employed by CBS as a programmer/software developer. Between 3 May 2004 and 5 May 2004, an incident occurred involving Mr Park which resulted in him being suspended on 6 May 2004, and subsequently dismissed on 18 May 2004. He says that both the suspension and dismissal are unjustifiable.

[2] CBS says that it dismissed Mr Park on the grounds of serious misconduct for refusing to obey a lawful and reasonable instruction. The company says that Mr Park's suspension and termination are procedurally and substantively justified.

Background.

[3] Mr Park described himself as having a high level of programming skill and mathematical knowledge which he acquired obtaining his MSC at University. This knowledge was invaluable to CBS both in his development role and troubleshooting. During late April 2004 CBS relocated its offices at the Massey University site. Mr Park was not happy with where his desk was in the office and he took the matter up with Mr Logan, the Chief Executive of CBS and one of its directors. He complained to Mr Logan that the location of his work station was next to a doorway, dark and very discouraging.

[4] Mr Park said he was a dedicated employee who worked hard for the company all the time, whereas by contrast, the other staff would slacken off and skylark when the bosses weren't around.

He said that by putting the other staff in the more favourable work station positions showed a lack of appreciation and recognition of his commitment and hard work, it was discouraging, and it sent a message to him to adopt similar work habits to the others who relaxed all day.

[5] Discussions about Mr Park's location continued for a period of time during which Mr Park set up in Mr Logan's office until the matter was resolved. This matter was finally resolved by Mr Park being given a bigger desk, and been relocated to another place in the office.

[6] Later, near the end of April, (27th, 28th & 29th), Mr Park and Mr Logan had several meetings about Mr Park's salary. The approach for the salary review was initiated by Mr Logan. During the several meetings between them, Mr Logan offered Mr Park an increase in salary, but Mr Park was not satisfied with the offer. Mr Park told Mr Logan what he thought he was worth which was considerably more than the new salary on offer. Mr Park also asked about the possibility of him being given shares in the company, however this was declined. He was not very happy with the outcome of the negotiations. I find that as part of his sense of dissatisfaction with the outcome of the negotiations, Mr Park expressed a stance to Mr Logan that if he felt unhappy, he would decide to *relax all day* being adopting work habits similar to the others who *were relaxing all day*.

[7] CBS had a large order from an important distributor company in Germany which had to be delivered to them by the 14th May 2004.. That company already had CBS's hardware and software. The software that CBS contracted to supply had technical problems. It was critical that the software problem was resolved in order that CBS could meet its 14 May deadline. On the 3rd of May Mr Logan told Mr Park of the problem and asked him to work with Mr van Iersel, another programmer to iron out and fix the software problem. The software programme that needed modifying was originally written by Mr Park.

[8] Mr Park did not rate Mr van Iersel as a programmer, nor did he have a very high opinion of him. Mr Park felt somewhat affronted for a number of reasons of being asked to work with Mr van Iersel. He felt personally affronted because it was suggested that the problem in the software was Mr Park's fault. Mr Park was strongly defensive of the software. He was of the view that Mr van Iersel is a programmer and therefore he should be able to fix it himself.

[9] Mr Park was also very protective of his superior knowledge and skill and was most reluctant to share it with van Iersel. He saw it as an erosion of his position within CBS, as he said that in his Korean culture, the knowledge that one has determines your worth to your employer, and if you shared that knowledge around with other employees, it would diminish your status as a valuable employee. Mr Park asked Mr van Iersel to reproduce the fault, but because he could not show Mr Park an example of the fault, Mr Park concluded *that the problem was just an excuse for Mr van Iersel or Mr Logan to prevail upon him to transfer his knowledge*.

[10] On 5 May, Mr Logan noticed that Mr Park was not working with van Iersel and when he asked why not, he was told that Mr Park would not work with him. Mr Logan talked to Mr Park about working with Mr van Iersel to resolve the software problem. Mr Park's response was very protective of his intellectual knowledge, his skills, and his programme. He expressed the view that if Mr van Iersel was an expert programmer, he should be able to fix the problem on his own. Mr Park said he was not prepared to share the code with Mr van Iersel. He would either fix it on his own, or Mr van Iersel should do it by himself.

[11] Mr Logan suggested to Mr Park that if he was not going to show Mr van Iersel the code, he should work with the rest of the team of programmers to identify and fix the problem. Mr Park agreed that such an approach could work, so with that Mr Logan got the team together to outline the team trouble shooting approach. The primary thrust of the way forward was for Mr Park to work

with Mr van Iersel to try and recreate the problem, then they were to discuss how it could be resolved. Mr Park would not have a bar of working alone with Mr van Iersel. During the meeting, Mr Park was openly critical of Mr van Iersel and again very protective of the programme and his intellectual property.

[12] Mr Logan asked Mr Park if he was not prepared to work with Mr van Iersel, was he prepared to work with him (Mr Logan) to resolve the problem. It is apparent from the evidence of Mr Logan, Mr van Iersel and Mr Anderson that Mr Logan asked Mr Park what they were going to do if Mr Park would not work with them to fix the problem. Mr Park did not respond to Mr Logan, and the meeting ended.

[13] The next day (6 May 2004) Mr Logan met with Mr Park and read the following letter he had prepared to Mr Park.

This letter confirms my discussion with you of today regarding serious issues noted to you.

Yesterday on the 5th of May I asked you to follow a lawful and reasonable instruction, and that was to work with Anthony on the coding to fix a technical matter.

You refused to undertake this action, notwithstanding that I asked you on at least three occasions to undertake this work. You continually refused.

Accordingly I therefore request you to attend a formal disciplinary meeting to explain your reason for not undertaking this instruction.

In addition, at the meeting I will also ask you to explain your recent statement made on the 29th of April that if you feel unhappy you will decide to relax all day. This indicates to me that you are not prepared to undertake your full work activities.

If you are not able to provide adequate reasons for your failure to follow this request, and your statement, your employment will be terminated.

This meeting will take place on Tuesday 11 May 2004 at 2pm in my office.

Given the seriousness of this matter you are suspended from duty on pay until the meeting.

[14] The disciplinary meeting took place on the 11th of May. Mr Sharp, Mr Park's representative spoke for Mr Park and was his mouthpiece for the entire meeting. The mitigating explanations Mr Sharp put to the company included Mr Park's views of Mr van Iersel, the cultural aspects of knowledge, the undermining of ones status, seating arrangements, the salary negotiations, and being undervalued.

[15] One week later, on the 18th of May, CBS conveyed its decision to dismiss Mr Park by way of a voicemail message left on Mr Sharp's phone. CBS confirmed its decision to dismiss Mr Park in writing which read;

Notice of Termination.

Further to our advice to your legal advocate, I now advise you in writing of the termination of your employment on the grounds of serious misconduct.

I do not accept your explanations to the questions we raised with you at the formal disciplinary meeting on Tuesday 11 May with yourself and your legal advocate.

At the meeting, you stated that your reason for refusing to obey my lawful and reasonable instruction, (which was given to you three times) was that you felt that it was inappropriate for you to do so, as this was not common to your culture and that you would lessen your influence within the business if you handed information on.

I also do not accept your explanation, which was similar to that noted above, in relation to your earlier statement, that unless your remuneration was increased you would not undertake your full duties.

As you were aware on the day that you refused my instruction, we were under great pressure to turn around a product to meet our customer's needs. Accordingly I believe that your actions in refusing to undertake the instruction given to you, was a deliberate attempt on your part to extract a higher salary from us at a time when we were very vulnerable.

You have worked with the business long enough to understand both the way we operate and the flexibility that all staff display, and that failure to undertake an instruction is serious misconduct.

Accordingly I therefore terminate your employment as noted above.

Legal principles

[16] The general principle applying to the action of suspension carried out by an employer will usually require an employer acting fairly to consult with an employee about a proposed suspension before deciding whether and when to take that step. Mr Park's suspension on 6 May was the first step CBS took in its disciplinary process. He was given a letter which confirmed Mr Logan's views of the events of 5 May, it requested that he attend a disciplinary meeting, it raised the *relax all day* matter of 29 April, it put him on notice that if he did not provide adequate explanations his employment would be terminated, and that given the seriousness of the matter, he was suspended on pay. He was not consulted on the question of whether he should be suspended or not, he was suspended.

[17] Suspension of an employee is a serious matter. Suspension without a prior opportunity for the employee to comment on the appropriateness of the suspension can constitute an unjustified action. *Tawhiwhirangi v Attorney-General* [1993] 2 ERNZ 546. Mr Park was suspended without a real opportunity to consider or comment on it, and he remained on suspension until his employment was terminated on 18 May 2004.

[18] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of Court decisions. When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct but is whether the employer had reasonable grounds for believing that there was misconduct. In *Drummond v Coca – Cola Bottlers NZ* (1995) 2 ERNZ 229 at 234 the Employment Court stated;

The initial question ...is solely this: On the basis of the enquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgment about the quality of the enquiry and the quality of the decision based upon it.

[19] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal. These have been concisely stated by the Labour Court in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, to be the following;

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

[20] Mr Park's employment was terminated for serious misconduct in that he refused to obey a lawful and reasonable instruction. CBS was of the opinion that Mr Park's refusal to obey the instruction was a deliberate attempt on his part to extract a higher salary during a time when it was under extreme pressure to meet the delivery deadline. The lawful instruction Mr Park disobeyed was apparently given to him three times.

[21] The evidence of CBS's witnesses in respect of the meeting of 5 May, and how it ended leads me to conclude that Mr Park was an absolutely crucial part of the equation to resolve the software glitch on time. Every member of the team (including Mr Park) was aware of the time constraints. Mr Logan was trying to resolve the technical problem by exploring several options with Mr Park. Mr Logan put various scenarios to Mr Park, but was met with very determined defensive, personal protective stances from Mr Park. Mr Logan was understandably exasperated by Mr Park's stance to the extent that he said to Mr Park *if you are not going to do what I direct you to do, what are you going to do?* Mr Logan called the meeting to a close because he was not sure what to do from there.

[22] It is my view that whilst Mr Logan was looking for ways and solutions to get Mr Park to help with the troubleshooting and fix the glitch, it was not made unequivocally clear to Mr Park that his continued stance was a serious matter, and if he did not work with either Mr van Iersel, or the team, he was putting his employment in serious jeopardy, he would be sacked.

Determination

[23] It is my determination that the circumstances surrounding Mr Park's suspension, CBS's decision to dismiss Mr Park, and the manner in which the termination was carried out was not just and fair in all of the circumstances. Mr Park was unjustifiably dismissed; he therefore has a personal grievance and is entitled to remedies.

Remedies.

[24] Having concluded that Mr Park was unjustifiably dismissed, it follows that consideration must be given to the remedies he should receive to resolve his employment relationship problem. The remedies available to him are set in sections 123, 124 and 128 of the Employment Relations Act 2000. Under section 124 of the Act, the Authority must consider the extent to which the employee's actions contributed towards the personal grievance.

[25] Mr Park's stance of not accepting that there was a problem with the programme, his refusal to work with Mr van Iersel, and his unhelpful obstructive disposition is blameworthy conduct to a degree sufficient in my view to reduce any remedies by 60%.

[26] Mr Park is seeking loss of remuneration from the date of his dismissal up to the date of the investigation meeting plus compensation under s.123 (c) (i) of the Act. Under s.128 (3) of the Act,

the Authority may at its discretion award more than 3 months loss of remuneration. It is my view after considering all of the circumstances of this matter it would be inappropriate to exercise that discretion.

[27] Mr Park is entitled to the equivalent of 3 months lost remuneration reduced by 60% for his blameworthy conduct, therefore, Creative Business Systems Limited is ordered to pay Mr Park \$5250.00 under s.123 (b) which I calculated from his salary of \$52,500.00 per annum.

[28] Whilst I am satisfied that Mr Park has suffered some humiliation, loss of dignity and injury to feeling as a result of his personal grievance, I am mindful of his demeanour at the investigation meeting, and his representatives description of Mr Park's approach to the disciplinary meeting which was one of righteous indignation. Creative Business Systems Limited is ordered to pay My Park \$1200.00 under s.123 (c) (i) of the Act.

Costs.

[29] Costs are reserved.

Ken Raureti
Member of Employment Relations Authority