

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 225  
5411926

BETWEEN REGINALD PAUL PHILLIPS  
Applicant  
A N D JASONS TRAVEL MEDIA  
LIMITED  
Respondent

Member of Authority: M B Loftus  
Representatives: Reginald Phillips on his own behalf  
Stephen Langton, Counsel for Respondent  
Investigation meeting: 18 October 2013 at Nelson  
Submissions Received: At the investigation meeting  
Date of Determination: 1 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Reginald Phillips, claims he was unjustifiably dismissed by the respondent, Jasons Travel Media Limited (Jasons), on 14 February 2013.

[2] Jasons says there was no dismissal and Mr Phillips left of his own volition.

[3] In the alternative, and with no admission in respect to their prime contention, Jasons says if Mr Phillips was dismissed, it was justified in the circumstances.

**Background**

[4] Jasons, as its full name suggests, is a travel media company. Mr Phillips was engaged as a sales representative and at the time of cessation covered the South Pacific Island (SPI) territory.

[5] His terms of employment were stipulated in a written agreement dated 19 December 2005. Pertinent to this dispute are the following provisions:

2.2 *You will work from Jasons offices. They are currently located at 2 Ngaire Avenue, Epsom, although you acknowledge they may change and that this will not restrict the right to relocate you should the need arise.*

2.3 *You may also be assigned to work in different areas or territories and Jasons may change these from time to time or require you to work in other areas or territories not normally assigned to you.*

16.1 *In the event that either you or Jasons wish to terminate this agreement four weeks' notice in writing must be given to the other party. This notice may be varied by mutual agreement.*

16.8 *In the event of your employment being terminated by Jasons on grounds of redundancy you will be given four weeks notice of termination, or payment in lieu thereof. No redundancy compensation will be payable.*

[6] Notwithstanding clause 2.2 Mr Phillips has never worked from Epsom. For the last couple of years he has lived in, and worked from, Nelson. His work involves 6-7 trips to various Pacific Islands each year, along with infrequent (averaging one per year) trips to Auckland for meetings. The rest of the time he worked from home.

[7] Historically Jasons was profitable but that recently changed. As a result its newly appointed CEO, Mr Kevin Francis, began scouring the business for potential cost savings and various structural changes occurred throughout 2012.

[8] In the second half of 2012 Mr Francis turned his mind to Mr Phillips' position and a possible relocation to Auckland. There were two main reasons. First it appeared efficiencies could be gained and the occurrence of costly errors reduced by having him in close proximity to the marketing, production and debt collection teams. The second was cost. It was cheaper for Mr Phillips to travel to the Pacific from Auckland and Jasons could avoid the costs of travel to Auckland meetings.

[9] Mr Phillips disagrees. He says the two errors discussed in evidence would not have been avoided even if he had been in Auckland and the alleged costs saving is significantly less than Mr Francis estimated.

[10] While he was considering the question of where Mr Phillips' role should be located Mr Francis did not raise it with Mr Phillips till January 2013. Mr Francis

attributes that decision to the fact Mr Phillips took a couple of months leave towards the end of 2012 and he felt it inappropriate he raise the question prior to the leave.

[11] On 14 January 2013 Mr Francis sent an email to Mr Phillips. It reads:

*Discussion on location of SPI Rep*

*Reg,*

*I have been deliberating on the location of the role of SPI sales.*

*There are a number of factors weighing against the role being based in a regional centre away from head office, not least of which is the additional cost of travel to and from the islands. Proximity to the marketing and production teams both pre and post sell is also more challenging.*

*I'd like to arrange a time to discuss this with you. I appreciate the circumstances you discussed with me last year and I'd like to get feedback from you on relocation to Auckland.*

*Kevin*

[12] The previous years' discussion was one in which Mr Phillips advised Mr Francis of various reasons why he could not leave Nelson. Mr Phillips initially denied the conversation occurred but later conceded it did.

[13] Mr Phillips' initial response came quickly and simply read *Please say a time Kevin. Thanks.* That was soon followed with *To put you in the picture Kevin. My personal circumstances are such that I cannot and will not relocate to Auckland. Thanks.*

[14] On 17 January the two had a telephone conversation. Mr Phillips claims Mr Francis advised the decision to relocate had been made as the savings totalled \$10,000 pa. Mr Phillips says he disputed the figure and calculated the saving as only \$1,800.00. He also said he saw little benefit from closer proximity to sales and marketing. He goes on to say *I asked Kevin if he could qualify that information and send it to me. Kevin suggested that I put my feedback in writing and send it to him.*

[15] Mr Francis's recollection is not vastly different. He denies the decision had been made. It remained a proposal and the \$10,000 was nothing more than an estimate with no real foundation, uttered only because Mr Phillips kept demanding a figure. He says Mr Phillips responded by saying he would send a spread sheet

showing the saving was only \$1,800. Mr Francis says he closed by asking Mr Phillips record, in writing, the points he had made and send it as soon as possible.

[16] Mr Francis goes on to say that as written comments were not forthcoming by 22 January he made a decision to relocate based on Mr Phillips oral input. He then sent Mr Phillips an email advising the decision. It ends by referring to the email in which Mr Phillips said he would not move to Auckland and a previous conversation in which Mr Phillips is said to have indicated he may not even be able to stay in the SPI role before stating a wish to develop a transition plan and discuss any possible opportunity which might match Mr Phillips personal circumstances and Jasons requirements.

[17] Mr Phillips' response was to deny he had indicated he could not continue in the SPI role, at least from Nelson, before confirming he would not relocate to Auckland. He went on to say he was interested in discussing other opportunities that may be of mutual benefit.

[18] That was followed by a number of emails over possible meeting times though Mr Phillips claims to have been ambushed when the meeting eventually occurred, in Nelson, on 14 February 2013. He says he had no idea what the meeting was about.

[19] Also present at the meeting between Messrs Francis and Phillips was Jasons Commercial Manager, Tim Cantlon. While not known to Jasons at the time Mr Phillips recorded the conversation. The recording is no longer available but prior to its destruction, Mr Phillips prepared a detailed, but not verbatim, record of the meeting which went approximately 1 ¾ hours. Jasons disputes some of the content.

[20] About the meeting Mr Phillips says they initially discussed the meetings purpose which, he was told, was to discuss the ramifications of moving his position to Auckland. They then spent considerable time discussing the situation and Mr Phillips claims Mr Francis advised, at least four times, he would be given notice the following day, Friday 15 February 2013. They also discussed other possible roles within Jasons though Mr Phillips concluded none were viable. Indeed, he incorrectly went so far as to say one in Australia could not be offered given an erroneous understanding of the circumstances.

[21] Mr Phillips goes on to say that after 51 minutes Jasons advised there were no further points to discuss and the meeting was over. There then followed a lengthy

discussion during which Mr Phillips challenged the legitimacy of a decision to move his role to Auckland and the probable redundancy that would follow. He says he then advised he would raise a personal grievance and Mr Francis reacted by trying to resile from his decision to give notice.

[22] Mr Francis accepts the initial discussion revolved around the meetings rationale. He accepts he advised the meetings purpose was to confirm the role was being relocated to Auckland and to provide one months' notice of termination due to redundancy. A significant discussion then ensued with a key accusation being the decision was nothing other than a wrought to facilitate Mr Phillips' replacement with a friend of the owner on a lower salary.

[23] The two then discussed alternate roles for Mr Phillips who was not interested in those canvassed. Mr Francis says it did, however, become apparent Mr Phillips was raising some issues which required further investigation and consideration.

[24] As a result Mr Francis decided it appropriate he *pause the process*. He wanted Mr Phillips to put his views in writing so they would be properly understood and considered before any further action was taken.

[25] Mr Francis says he explained this to Mr Phillips and advised he continue as normal in the interim. He goes on to say Mr Phillips responded by advising Mr Francis could not retract notice already given, to which:

*I stated that this was not correct and that under his employment agreement, notice had to be in writing.*

[26] The two then continued discussing the merits or otherwise of relocating Mr Phillips role to Auckland. According to Mr Francis the meeting ended with advice Mr Phillips was unhappy with the restructuring process and would be raising a personal grievance.

[27] The following day, 15 February 2013 Mr Phillips sent a notice which, having quoted clause 16.1 of his employment agreement, goes on to say:

*Yesterday the CEO of Jasons Travel Media (Kevin Frances) stated that I would be given four weeks' notice as of today Friday 15 Feb 2013. I have agreed and accepted this notice.*

...

*At a later stage in the discussion the CEO retracted this notice to my protest and disagreement.*

*I am of the understanding that the CEO does not have the right to retract and vary the period of notice agreed to, as he has done, after a Personal Grievance matter was raised with him.*

...

*I wish to fulfil my responsibility in accordance with clause 16.1 (above) of my Employment Contract.*

*I have been given four weeks' notice as of today so my last day of work with Jasons Travel Media will be 15 March 2013.*

*Yours faithfully*

[28] Mr Phillips worked out his notice and while there was further interaction, including the raising of the promised personal grievance. In essence Mr Phillips acted on the basis he was leaving and that he did on 15 March having returned Jasons equipment.

### **Determination**

[29] Mr Phillips' position is he was dismissed while discussing a purported redundancy situation which was a sham. He claims Jasons intended replacing him with a lower paid individual who they had already engaged.

[30] Mr Phillips accepts Mr Francis tried to withdraw the alleged notice but contends the offer was designed to make it look as if Jasons was consulting when, in fact, it was a meaningless gesture tendered in response to advise he was pursuing a personal grievance.

[31] Jasons position is it had a legitimate structural concern and questioned the prudence of continuing to allow Mr Phillips to operate from Nelson. It accepts it indicated redundancy was a distinct possibility but denies actually giving notice. Jasons is of the view Mr Phillips took advantage of its attempts to discuss the situation and manufactured a departure he already sought.

[32] It is for an applicant to establish, prima facie, a case that requires answering. For the following reasons I conclude Mr Phillips has failed to do so.

[33] Against him is the fact various key assertions failed to withstand scrutiny. For example he claims the purported redundancy was a sham designed to allow the appointment of a friend of the owner as his replacement. The evidence did not support this allegation with the person in question being engaged on a five week fixed

term while Mr Phillips was on leave. He was not retained, despite Mr Phillips departure.

[34] A second key assertion was the decision to *pause the process* was a meaningless ploy tendered in response to his advice he would pursue a personal grievance. Putting aside the fact Jasons disputes some of the content (not much I would add) even Mr Phillips own notes do not support his claim. They record the decision to pause as being advised after about an hour and a quarter and some twenty minutes before he mentioned a possible personal grievance. The attempts to persuade me the notes were wrong on this one point were unconvincing.

[35] Add to that the fact there are other inaccuracies in the notes. One example is Mr Phillips assertion (at about 14 minutes) he had never discussed his personal circumstances with Mr Francis. He had to concede that was incorrect.

[36] Jasons evidence, produced solely by Mr Francis, was not marred by such inconsistencies or failures. He openly conceded points which might potentially undermine Jasons position with one example being a ready acceptance he entered the discussion of 14 February with an expectation it would end in Mr Phillips redundancy.

[37] Evidential issues aside, there are other factors in my conclusion. The employment agreement requires notice be given in writing. It never was.

[38] Furthermore, and when giving oral evidence, Mr Phillips resiled to some extent from his claim he had been given categorical notice. It became *the understanding in my mind was* and *I thought I have been given notice* with the letter of 15 February being an attempt to confirm the understanding (not that it reads that way and was accompanied by the notice of grievance).

[39] In any event and even if notice was given orally (which Mr Francis denies) it is difficult to conclude it was accepted before Mr Francis advised he was putting the process on hold. Rather than meekly accept the situation Mr Phillips continued to argue his case. That is not acceptance and not a concluded arrangement under which Mr Phillips would depart.

[40] There is then the fact, clearly confirmed by Mr Phillips, he would not relocate to Auckland. He thought the proposal misguided and says he sought to convince

Jasons accordingly. The notes record he got what he wanted, or at least a further chance to attain it, which he suddenly rejected and threw back at his employer. I cannot criticise an employer to acceding to input when discussing a potential redundancy and choosing to reconsider its position as Jasons did here.

[41] Why, though, would Mr Phillips reject an offer which amounted to the attainment of that he says he sought – namely a reconsideration of the decision to relocate his role. The answer became obvious through various comments he made. He embarked upon several blistering, yet unsubstantiated, attacks on Mr Francis, his integrity and the negative impact Mr Phillips felt Mr Francis had had on Jasons as a place to work. For whatever reason, Mr Phillips wanted out and said so more than once during the investigation. He saw an opportunity with a potential for financial gain, as he claimed in the letter of 15 February raising the grievance and took it.

[42] The evidence convinces me Mr Phillips' departure was his decision and not brought about by that which Mr Langton submits is required for the claim to succeed – namely a terminal and permanent sending away orchestrated by the employer.

[43] Even if I am wrong and Mr Phillips was dismissed I fail to see what advantage might accrue. There are strong indications Jasons could justify a decision to move the role to Auckland which, given Mr Phillips personal circumstances and his rejection of alternate roles within the company, would undoubtedly have meant his redundancy. Clause 16.8 would then preclude any compensatory payment.

[44] Even if that were wrong and Jasons could not justify a redundancy the remedies attainable by Mr Phillips would remain relatively minor and would, on the evidence I heard, be limited to an award under section 123(1)(c)(i). Recognition of lost salary would appear unobtainable for two reasons. First, and applying *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 at 977 and given the decision not to accept Mr Francis's offer to review his initial conclusion the role should relocate, there is a strong argument Mr Phillips has failed to mitigate his loss. In any event, he has been engaged in establishing a new business venture and was adamant he would disclose no details of either it or any earnings that may have accrued. With that approach he would be unable to establish a loss.

**Conclusion**

[45] For the above reasons I conclude Mr Phillips has failed to convince me he was dismissed, let alone unjustifiably. His claim fails.

[46] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority