

Attention is drawn to the order prohibiting the publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 190
3001877

BETWEEN SCOTT RANKIN
Applicant

A N D UNLIMITED INTERNET
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: P Kiely/S Ball, Counsel for Applicant
B Edwards/M Cables, Counsel for Respondent

Investigation Meeting: 6 June 2017 at Auckland

Submissions Received: 7 and 12 June 2017 from Applicant
8 June 2017 from Respondent

Date of Determination: 04 July 2017

DETERMINATION OF THE AUTHORITY

- A. Scott Rankin was unjustifiably dismissed by Unlimited Internet Limited.**
- B. I order Unlimited Internet Limited pay lost remuneration of \$2,600 which includes a reduction of 75% for Mr Rankin's contributory behaviour pursuant to s.s.123B, 128 and 124 of the Employment Relations Act 2000.**
- C. I order that Unlimited Internet Limited pay compensation of \$1,250 including a reduction of 75% for Mr Rankin's contributory behaviour pursuant to s.123C(i) and 124 of the Employment Relations Act.**
- D. Costs are reserved.**

Non-publication order

[1] There is a non-publication order pertaining to the evidence about a witnesses health status only as set out in the Memorandum of Respondent Counsel dated 08 June 2017 and its attachment

Employment Relationship Problem

[2] Scott Rankin was employed by Unlimited Internet Limited (UIL) until 1 December 2016. He alleges he was constructively and/or unjustifiably dismissed. UIL denies he was dismissed. It states he resigned with immediate effect.

Relevant facts

[3] UIL is an internet service provider. It supplies technical assistance to customers relating to internet connectivity issues. Mr Rankin commenced employment on 4 April 2016. He was a support technician. He was required, amongst other things, to provide customer support by way of telephone and email.

[4] During his employment there were various customer concerns raised about his responsiveness to queries. Some assistance was provided by way of training. It is accepted he was not subjected to any disciplinary action.

[5] By 1 December 2016 Mr Rankin was called into a meeting with Benjamin Simpson, Director and Chief Executive Officer, and Bradley Cooke, Chief Information Officer. Mr Rankin was given no information as to why the meeting had been called.

[6] At that meeting it was accepted Mr Simpson raised a number of performance concerns. By the end of the meeting Mr Rankin's employment had been terminated. Mr Cooke took Mr Rankin back to the office to collect his property. Mr Rankin returned his office keys then left.

[7] Mr Simpson attempted to contact Mr Rankin on 5 December 2016. However Mr Rankin was in the process of instructing solicitors. His solicitors wrote the same day to UIL raising a personal grievance of unjustified dismissal. He sought reinstatement and compensation of \$20,000 amongst other things.

[8] Following receipt of that letter Mr Simpson proceeded to investigate the client complaints against Mr Rankin. UIL has filed a counterclaim for perceived losses caused by Mr Rankin's behaviour during his employment. That matter has been directed to mediation. This matter now requires determination.

Issues

[9] The issues for determination are:

- a) Was Mr Rankin dismissed? Was his dismissal unjustified?
- b) If he was not dismissed, were the circumstances of his termination a constructive and unjustified dismissal?
- c) What remedies should he be awarded?

Dismissed or resigned?

[10] Mr Rankin submits he was asked to resign or be summarily dismissed for poor performance on 1 December. UIL submits the initiative for resigning came from Mr Rankin. I believe the truth lies somewhere in between.

[11] A commonly applied test for constructive dismissal is whether the initiative for the dismissal has come from the employer¹. Employers should not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.² A breach of this duty by an employer that leads a worker to resign is constructive dismissal³.

[12] To found a claim for constructive dismissal, there must not only be a breach of duty by the employer, but the breach must also be of such character as to make the employee's resignation reasonably foreseeable.⁴

¹ *NID Distribution Workers etc IUOW v Foodtown Supermarkets Limited* [1988] NZLR 588(LC)

² *Review Publishing Company Limited v Walker* [1996] 2ERNZ 407 (EmpC) applying *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2NZLR 415, [1994] 1 ERNZ 168(CA).

³ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at [374] to [375].

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140, (2011) 8 NZELR 604.

[13] From the evidence I do not accept Mr Rankin was given the choice to resign or be dismissed. Mr Rankin's chat logs revealed he would make threats to resign, misuse drugs and alcohol, make lewd commentary about women and inappropriate ethnic and racist comments. Mr Rankin admitted he made the statements. He stated that upon reflection he was embarrassed by this dialogue. My view of that evidence was Mr Rankin tended to act first and think later.

[14] I also do not accept UIL's evidence Mr Rankin resigned of his own volition, the parties agreed to payment of two weeks' notice and Mr Simpson gave him time over the weekend to rescind his resignation or hand in a written termination letter. No written termination letter was ever given by Mr Rankin as required by his employment agreement.

[15] Mr Simpson's subsequent behaviour indicated the meeting on 1 December did not end as amicably as suggested. When UIL received Mr Rankin's lawyer's letter seeking reinstatement and \$20,000 compensation, Mr Simpson refused to pay out any notice as allegedly agreed or required under the employment contract and refused Mr Rankin's return to work. These were not the acts of an employer wishing to retain a valued employee.

[16] Matters did not end there. Mr Simpson then undertook an investigation of Mr Rankin's performance including reviewing the chat logs. This behaviour did not suggest UIL had any wish to retain Mr Rankin. Rather it appeared Mr Simpson was angry with Mr Rankin and wished to find fault with his employment to justify the dubious termination circumstances.

[17] It is Mr Simpson's evidence at hearing that gave the best insight into what most likely occurred on 1 December. He admitted to me under examination that at the meeting "*I believe I may have said 'Do you want to resign'. [Scott] said 'Yes. I feel it would be the best thing.'*" His evidence is consistent with my view of both his and Mr Rankin's general behaviour at that time.

[18] **[Omit this paragraph from published determination]**

[19] Given the above evidence I do not accept Mr Cooke's evidence that Mr Rankin resigned without prompting by Mr Simpson. That may be Mr Cooke's honest belief about the circumstances but Mr Simpson's evidence showed it was his initiative that caused the

resignation. This was conduct that would seriously damage the relationship of trust and confidence.

Was the resignation reasonably foreseeable?

[20] It was accepted there was no forewarning this meeting would be about his performance. Mr Rankin was young and inexperienced at the time. This was evident in the above chat log behaviour. I have little doubt Mr Rankin would have been upset to hear about UIL's performance concerns in this manner. It certainly did not accord with any notions of fairness and reasonableness. It is also reasonable he would have had doubts UIL wanted to retain him at all after being criticised for his performance then given the option to resign. An employer would have reasonably foreseen resignation by an employee in these circumstances.

[21] There was no evidence the constructive dismissal could be justified pursuant to s103A of the Act. In the circumstances Scott Rankin was unjustifiably dismissed by Unlimited Internet Limited.

Remedies

[22] Mr Rankin has confirmed he no longer seeks reinstatement. He does seek 16 weeks of lost earnings and compensatory damages.

[23] There is no issue he has mitigated his losses. He obtained new employment on 22 March 2017. His lost remuneration was \$10,400 (net) subject to any reduction for contributory behaviour.

[24] Mr Rankin seeks \$20,000 compensatory damages. I do not dispute his evidence he was hurt by UIL's actions. Both parties evidence confirmed he was friendly with the Simpsons. He had been invited to perform the Simpsons' wedding as the celebrant.

[25] Compensation for hurt and humiliation involving constructive dismissals in the Authority over the past 12 months have varied from \$2,400⁵ (2 years employment with

⁵ *Hartstone v Enviro Scientific Group Ltd* [2017] NZERA Auckland 41.

reduction for contributory conduct) to \$12,000⁶ (8 months employment no reduction for contributory conduct).

[26] Standing back and considering the evidence I consider this matters falls within a lower band of compensation starting at \$5,000. This is because Mr Rankin confirmed in his oral evidence that his ‘hurt’ was temporal. This was evidenced by his ability to quickly find employment. His employment at UIL was also short lasting about eight months. This remedy is subject to any further reduction for contributory behaviour.

Contributory behaviour

[27] The extent to which an employee’s actions contributed towards the situation that gave rise to the personal grievance may require reduction in remedies that would otherwise have been awarded.⁷ Contributing behaviour is behaviour which is causative of the outcome and blameworthy.⁸

[28] There was some merit to the performance concerns raised on 1 December but nothing in my view that would have prompted disciplinary action. At best it showed he had difficulty interacting with clients and UIL needed to consider a performance improvement plan.

[29] Subsequently discovered misconduct can also be taken into account in reducing remedies.⁹ Where the misconduct is a significant additional factor remedies have been declined.¹⁰

[30] UIL produced Mr Rankin’s chat logs discovered subsequent to termination. These contain ethnic sexist and racist comments that were highly inappropriate for any workplace. Mr Rankin accepted he made these comments. He also accepted they may have been serious misconduct.

[31] If these chat logs had been known to the UIL it would have had reason to institute disciplinary proceedings and consider dismissal. However I balance what was occurring elsewhere in the workplace including the lack of reaction by any of the employees who

⁶ *Whaiapu v P & W Painters Ltd* [2017] NZERA Christchurch 23.

⁷ Section 124 of the Employment Relations Act 2000.

⁸ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

⁹ *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [104].

¹⁰ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [322].

received these comments via the chat log. No employee complained to UIL about Mr Rankin's behaviour prior to dismissal. This is even when his team manager received most of the chat now complained about. I have no evidence of what the affected employees said in reply because that information has been lost in the change between servers. Only Mr Rankin's side of the conversation has been preserved. I have some suspicion the chat log was not that one sided.

[32] This does not detract from the seriousness of the misconduct. Rather it does indicate UIL allowed this conduct to occur in its workplace given the managerial involvement. For that reason I decline to not make a reduction of 100%. Rather remedies are reduced by 75% to reflect both parties role in the subsequently discovered misconduct.

Orders

[33] I order Unlimited Internet Limited pay lost remuneration of \$2,600 which includes a reduction of 75% for Mr Rankin's contributory behaviour pursuant to s.s.123B, 128 and 124 of the Employment Relations Act 2000.

[34] I order that Unlimited Internet Limited pay compensation of \$1,250 including a reduction of 75% for Mr Rankin's contributory behaviour pursuant to s.123C(i) and 124 of the Employment Relations Act.

[35] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority