

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christopher Edward Reid (Applicant)
AND Vickers Marketing Limited (Respondent)
REPRESENTATIVES John Barratt-Boyes, Counsel for Applicant
George Vickers, Advocate for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 25 January 2005
DATE OF DETERMINATION 20 May 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Reid claims he was unjustifiably dismissed from his employment with the respondent. It is argued in the alternative that I might - on making findings of fact in the matter - find that he was unjustifiably constructively dismissed from his employment. The applicant seeks lost remuneration and compensation to remedy his alleged grievance and seeks reimbursement of expenses he submits were not paid to him during his employment. He also seeks arrears of wages alleged to be owing and costs in the matter.

The respondent denies dismissing Mr Reid constructively or otherwise.

History to this Matter

For the purposes of the problem I am called upon to resolve here I find that Mr Reid commenced employment with the respondent in the first week of January 2004. Mr Reid was employed to set up and manage the Auckland operation of the respondent's business which is based in Levin. He was also to sell the company's products and to hire, train and manage a small team of salespeople to undertake sales in the Auckland region. The employer's business involves selling first aid kits door to door.

As the team leader/manager of the Auckland operation of the business Mr Reid hired three salespeople and it was his job to collect them each morning and to deliver them to the designated sales locality. Thereafter, as well as pursuing sales himself, it was his role to remain in touch with his sales staff in the field and to ensure they were collected and taken for refreshments and toilet stops. It was also his role to collect sales people at the end of the day and return them to their homes. He was also responsible managing the paperwork and for delivering kits to customers who had purchased them. Mr Reid was provided with a company car for this purpose.

Mr Reid's remuneration was by way of retainer and commissions – being \$500 gross per week retainer, \$25 commission on each kit sold by him and \$5 override commission on sales made by his team members.

For the purposes of this story Farisha Khan was the first salesperson hired by Mr Reid. She commenced employment on 26 March. On 5 April another salesperson commenced employment in the Auckland team. Her name was Joshjuan Potatau. The third team member, Arohanui Hawke, featured only peripherally in events.

At first relationships between Mr Reid and his team members were satisfactory. However, relationships took a dramatic dive from the middle of April onwards. Ms Khan and Ms Potatau described being left alone by Mr Reid initially for short periods and later for lengthy periods of time. They say he picked them up in the morning late and left them alone in the dark (and even rain) waiting for pick ups at night. When they complained he was abrupt and abusive and this escalated to criticism of their sales performance and racist and personal abuse.

They decided they could work not with him and on 26 April Ms Khan rang Mr Vickers to request that she and Ms Potatau be allowed to work on their own. Mr Vickers wanted them to continue working with Mr Reid until he came to Auckland on 16 May when he would try to resolve the situation. Ms Khan refused and Mr Vickers allowed the women to work alone on the North Shore. That did not work out because Ms Khan's car was not reliable and the two women returned to work a sales area that had only recently been canvassed for sales. They had limited success.

Mr Vickers came to Auckland on 16 May. He met with team members Farisha, Josh and Chris on the night of the 16th and they had a meal together. They had discussions and it was agreed they would continue working together. Mr Vickers met with the team each night that week until he returned to Levin on 20 May. He was optimistic that matters had been resolved.

However, no sooner had Mr Vickers returned to Levin than relationships again became strained. Ms Khan says that Mr Reid accused her of being after her job. She said he told them he would have sacked them if he could have. Ms Khan and Ms Potatau describe Mr Reid abusing them and referring to them as lazy bitches. Ms Potatau described a humiliating personal accident which she suffered as a result of Mr Reid failing to answer her text to him for transport to enable her to get to toilet facilities. Ms Khan and Ms Potatau both described the relationship as intolerable.

They decided they would not work with Chris Reid ever again and advised their position to Mr Vickers.

Mr Reid's position is that he was phoned by Mr Vickers on 26 April and advised that Ms Khan and Ms Potatau were complaining about him both verbally and in writing and that would not work with him. He was advised that Mr Vickers had agreed to let the women work alone. Mr Reid was unhappy with Mr Vickers' unilateral decision to allow the women to work alone and the fact he would be denied override commissions on their sales. He was also unhappy that he was denied access to the written complaint and the opportunity to respond to it. He told Mr Vickers the two women were lying and they should be fired.

On 14 May he was told by Mr Vickers that Farisha and Joshjuan wanted to return to his team. He refused to accept them back and agreed to do so only after Mr Vickers threatened to close down the Auckland operation. (Mr Vickers denies threatening to close the Auckland operation).

Mr Reid met with the team and Mr Vickers over 16 - 20 May but he was unhappy that Mr Vickers would not give him greater authority and backing.

From the week commencing 24 May he became increasingly unhappy with Ms Khan and Ms Potatau and over the period 26 May – 2 June he complained to Mr Vickers that they were not turning up to work, they were refusing to work where they were told and were disrespectful to him and swore at him. He wanted to dismiss them.

Mr Vickers, who had been fielding this steady stream of complaints/allegations and counter allegations, came to Auckland on 6 June. It was not possible for him to meet the team members together. He met with Ms Khan and Ms Potatau on the evening of 6 June. They outlined their concerns to him and showed him two text messages they had received from Mr Reid. Mr Vickers considered them to be inappropriate.

Mr Vickers met with Chris Reid the next morning. Mr Reid's position is that he was told by Mr Vickers that he was pulling the plug on the Auckland operation and that Mr Reid was being dismissed because he was redundant. Mr Vickers' position is that on the morning of 7 June he advised Mr Reid that he had met with Ms Khan and Ms Potatau and that they were refusing to work with Mr Reid under any circumstances. Mr Reid's response was that they had sacked themselves. Mr Vickers told Mr Reid the women would work alone for the time being and Mr Reid could work with himself or another staff member (Dave) until Mr Vickers could arrange new transport for Mr Reid. Mr Reid was unhappy that he was to lose the car and that he was effectively being demoted to the position of salesperson. Mr Vickers exhorted him to see how things panned out. The situation was concluded that day with Mr Vickers taking the car and collecting some stock and paper work from Mr Reid's home. I find that Mr Reid was advised he would be collected for work the next morning.

Mr Vickers evidence was that he later found that Ms Khan was prepared to use her car in the interim and Mr Vickers said he tried to advise this to Mr Reid. He could not contact him and he was not at home when Mr Vickers called there the next day. Mr Vickers was finally able to speak with Mr Reid on the afternoon of 8 June and he told Mr Reid he would drop the car around shortly. Mr Reid said he was not at home and the situation was difficult for him because he had been made a laughing stock with the girls getting one over on him. In the event Mr Vickers said he would leave the car at the motel for Mr Reid to collect.

Mr Vickers returned to Levin. He next spoke to Mr Reid on 10 June. Mr Vickers asked Mr Reid to return to work. Mr Reid advised he had no money and Mr Vickers agreed to pay him and advance on his salary (banked on 11 June). Mr Vickers confirmed their conversation by way of letter to Mr Reid dated 11 June.

The evidence shows that the next event in this saga occurred when Mr Reid submitted a grievance to his employer based on a claim that he had been unjustifiably dismissed.

Issues to be decided

1. Credibility
2. How is Mr Reid's departure from Vickers Marketing Ltd. to be categorised and is he entitled to remedies?

Credibility

As a precursor to making any findings in this matter I must make findings of credibility.

On certain critical matters the parties are poles apart in their evidence e.g. the exact nature of the discussion that took place between Mr Vickers and Mr Reid on the morning of 7 June 2004 and on the days thereafter.

On other matters there is less divergence in the evidence and the weight of the evidence (including that of Mr Reid) supports a finding that his attitude and conduct towards Ms Khan and Ms Potatau was unacceptable and that he was overwhelmingly responsible for the breakdown in the relationship between himself his two team members. The other team members are not entirely without blame in the matter but I find their contribution to the breakdown in relationships was in the nature of reaction to the unacceptable attitudes and conduct of Mr Reid. I will return to this point.

Having met the witnesses and considered their evidence and the supporting documentation I find it is the evidence of Mr Vickers I prefer on the critical discussion that took place between them on 7 June. I also prefer his evidence on the discussions that took place between himself and Mr Reid between 8 and 11 June which is supported in most respects by the respondent's letter to Mr Reid dated 11 June¹.

How is Mr Reid's departure from Vickers Marketing Ltd. to be categorised and is he entitled to remedies?

The applicant bears the onus of proving (on the balance of probabilities) that the termination was, as matter of law, a dismissal and not a resignation. *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Limited* [1991] 2 ERNZ 267.

Mr Reid submits he was dismissed outright but it is also argued for him that he could be found to have been constructively dismissed.

In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

- (i) *An employer gives an employee a choice between resigning or being dismissed;*
- (ii) *An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
- (iii) *A breach of duty by the employer leads an employee to resign.*

Where does this leave me in respect to finding as to whether or not Mr Reid was dismissed from his employment?

I find that during the first week of June Mr Vickers was faced with a very serious issue of incompatibility within his Auckland team. This incompatibility had been evident for some

¹ I note this letter contradicts Mr Vickers' evidence that Mr Reid was to be provided with the car after all. The letter refers to Mr Reid being picked up for work and dropped off.

weeks and Mr Vickers had already attempted (unsuccessfully) to resolve the issues between Mr Reid and Ms/s Khan and Potatau. By 6 June relationships had, I find, broken down irretrievably. Mr Vickers came to Auckland to try and find a solution. He met with Ms Khan and Potatau on the evening of 6 June. He heard their concerns and viewed text messages sent to them from Chris Reid. He considered those messages inappropriate.

Mr Vickers knew these team members would never agree to work with Mr Reid again. He arrived at a solution which he advised to Mr Reid the following morning i.e. that Ms Khan and Ms Potatau would work alone and Mr Reid could work alone as a salesperson. This meant the car provided to Mr Reid would be removed and assigned to Ms Khan and Ms Potatau. Mr Reid would be collected and transported to work.

Mr Reid recognised that he was being demoted from the position of manager. He also recognised the loss of access to a vehicle. He was right on both counts. It was understood too that with demotion to the position of salesperson he would suffer a loss of income from the overrides on sales made by Ms Khan and Ms Potatau. I find these were essential terms of the respondent's contract with Mr Reid.

Demotion, with a corresponding loss of status and pay and benefits, may on occasion be justified. Where it is not justified it amounts to a serious breach of duty by an employer and in effect a repudiation of the contract which entitles the employee to choose to treat the employment as being at an end leaving the way open to pursue a claim of unjustified dismissal. Termination in such circumstances is referred to as a constructive dismissal.

Was Mr Vickers justified in demoting Mr Reid?

Incompatibility may be a ground for justified dismissal (or demotion) *Harris v Chief Executive, Dept of Corrections* [2000] 1 ERNZ 544. However, each case is to be examined on its own facts and the fundamental question is as always what was open to a fair and reasonable employer to do in the circumstances. *BP Oil v Northern Distribution Union* [1989] 3 NZ ILR. The issue is one of fact and degree.

As noted, Mr Vickers was faced with a serious issue of incompatibility within his Auckland sales team. He met and heard from Ms Khan and Ms Potatau and viewed text messages sent to them by Mr Reid. He considered them to be inappropriate. As a result he had serious concerns regarding Mr Reid's performance as team leader/manager in the Auckland region. He had to take this up with Mr Reid.

Mr Vickers did take the issues up with Mr Reid. However, in doing so he erred in predetermining the outcome of their discussions i.e. he had already decided that Mr Reid would be demoted with a consequential loss of status, remuneration and benefits. He decided this without any formal communication with Mr Reid or giving him an opportunity to be heard.

The minimum requirements of a fair procedure that must be followed before a dismissal or demotion can be found to be justified are those set out in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35, (1990) ERNZ Sel Cas 582. They are:

- Notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- A real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and

- An unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

I find that there was a complete absence of a fair procedure followed by the respondent's manager in demoting Mr Reid. He should have been advised of the respondent's concerns and told that his team leader manager's role could be jeopardised if Mr Vickers' enquiries confirmed the concerns relating to his performance as a manager. He should have been advised of his right to representation at a meeting where he would be given the opportunity to provide an explanation to the allegations against him. After hearing Mr Reid's explanations Mr Vickers would have been required to give those explanations unbiased consideration before arriving at any decision on disciplinary action – be it a warning, demotion or dismissal. Mr Vickers did none of these things.

I note too that the IEA which covered the employment between these parties itself contains a disciplinary process (albeit it is deficient in detail). Nevertheless where an employment agreement contains such a process it is a requirement that the employer will follow it if it becomes necessary to consider disciplinary action. Mr Vickers did not have regard to this procedure when he took disciplinary action against Mr Reid.

Mr Reid demotion was unfair and as such it amounted to a serious breach of duty by the respondent towards Mr Reid which justified him treating his employment as at an end. This outcome was entirely foreseeable.

Determination

Mr Reid was constructively dismissed from his employment with the respondent. The dismissal was unjustified and he has a personal grievance against his former employer. He is entitled to remedies.

Remedies

Contribution

Section 124 of the Act requires that where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

Mr Reid's contribution to the events which led to his demotion/departure from his employment was substantial. Were it not for the absence of even a modicum of a fair process here I would have found his contribution to have been total. In the event I set his contribution at 50%.

Lost Remuneration

I accept the medical evidence that Mr Reid suffered from a depressive illness after his dismissal and as a result I am not weighing the duty to mitigate during the three months after his dismissal. I am, however, limiting the period for consideration of loss to that period.

If no contribution were to be set in this matter I would award Mr Reid three months lost remuneration less the \$500 advance on salary he received on 11 June i.e. \$15,175.22. (This

sum is based on Mr Reid's total earnings over the 22 weeks he was employed from 5 January to 7 June 2004 - \$26,529).

As a result of reducing the remedy available to Mr Reid by 50% I direct the respondent employer to pay to Mr Reid the sum of \$7,588.11 gross to compensate him for remuneration lost as a result of his dismissal.

Lost benefits

Loss of the Use of the Car

Mr Reid had the use of a car as a term of his employment. He sets \$2500 as the value of the car for three months. The value claimed is reasonable and I direct the respondent pay to Mr Reid the sum of \$1250 gross (being 50% of the value of the vehicle for three months).

Telephone Rental

I am satisfied on the evidence that Mr Reid has been fully reimbursed for his telephone expenses and I make no award under this head.

Rent and Bond

I find there was no agreement between the parties that the respondent would pay the bond on Mr Reid's apartment. I do find that the respondent agreed to pay \$100 per week towards the rent once sales reached 100 units per week. This was to reimburse Mr Reid for the use of his home for storage purposes. As far as I am aware sales did not reach the numbers that would make this agreement operative and I make no award under this head.

Compensation under s123 (c) (i)

The respondent employer did not follow a fair process in dealing with the concerns that arose with respect to Mr Reid's performance. However, I accept the employer was faced with a difficult situation that required resolution. It was a situation that arose largely as a result of Mr Reid's unreasonable approach to his management role and in respect of which he took no responsibility and offered no constructive solutions. I note too, that Mr Vickers saw the approach he adopted as an interim measure only and he sought to retain Mr Reid in his employment.

Had Mr Reid not contributed to the events which gave rise to his dismissal I would have set compensation at \$3000. Given Mr Reid's contribution I direct the respondent to pay to the applicant the sum of \$1500 under this head.

Arrears of Wages Claims

Overrides

Mr Reid is entitled to overrides on all sales concluded by members of his team during his employment including the sales made by Ms Khan and Ms Potatau over the weeks they

worked on their own. The employer is directed to pay to Mr Reid any overrides not already accounted for and paid to him.

Deduction from Mr Reid's wages

There was a deduction of \$2074 from Mr Reid's wages. The deduction was made without the written authority of the worker.

I am satisfied the deduction amounted to an agreed wash up between parties to balance the retention of cash deposits by Mr Reid (retained by him to cover expenses). However, the Wages Protection Act 1983 is clear that no deductions may be made from a worker's wages without the worker's *written* authority. Wages are sacrosanct and for this reason I direct the respondent to pay to Mr Reid \$2074 to reimburse him for the deduction made without the appropriate authority.

Summary of Orders

I have directed the respondent to pay to the worker the following sums

Lost remuneration:	\$7,588.11 gross
Loss of benefits (Car):	\$1,250 gross
Compensation (s.123(c) (i)):	\$1,500 net
Arrears of Wages:	Overrides to be calculated by the employer and paid to Mr Reid. \$2,074 net deducted from Mr Reid's wages without written consent.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority