



[3] Mr Riosa says his dismissal was unjustified and seeks remedies to compensate consequent lost wages and hurt feelings as well as special damages for opportunity losses and costs. He also seeks findings relating to bonus payments he says are due and owing from April 2007.

[4] I record the non-publication orders made in relation to all confidential material provided in evidence to the Authority.

### **Issues**

[5] To determine this employment relationship problem the Authority must consider:

- (i) Whether Mr Riosa's dismissal for poor performance was a decision a fair and reasonable employer would have made in all the circumstances;
- (ii) Whether a profit share bonus is due and owing to Mr Riosa from April 2007;
- (iii) Whether Mr Riosa was overpaid the sum of \$11,818.28.

### **Relevant legal principles**

[6] Mr Riosa was dismissed for poor performance. The tests for fairness in such a dismissal are set out in *Trotter v Telecom Corp of NZ*<sup>1</sup>. These tests were restated by Chief Judge Goddard in *Ramankutty v Vice-Chancellor of the University of Auckland*<sup>2</sup>:

*23 Just as with misconduct, the employer must carry out a fair investigation with full participation in it by the employee. Having done that, the employer is then entitled to come to a decision whether the employment of the employee is going to be continued, provided always that the employer has not only followed a fair procedure during the investigation of the complaints about the employee but has also previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which are objectively measurable and have been objectively measured.*

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<sup>1</sup> [1993] 2 ERNZ 659

<sup>2</sup> 25/10/01, Goddard CJ, AC53B/01

[7] The role of the Authority in applying this test to the parties' employment relationship problem is to assess whether the actions of the employer, considering all the relevant circumstances at the time of dismissal and on an objective basis, were fair and reasonable<sup>3</sup>.

### **Unsatisfactory performance**

[8] The general manager of NRG, Phillip Coutts, wrote to Mr Riosa on 8 September 2008:

*Dear Libby*

#### ***Disciplinary Meeting***

*You are required to attend a disciplinary meeting in my office on 11 September, 08at 1600 hrs. The purpose of the meeting is to:*

- *Discuss your continued unsatisfactory performance*
- *Provide you with an opportunity to explain all of the allegations outlined in Attachment 1*

*The Company considers unsatisfactory performance to be a serious shortcoming and unacceptable. You have been warned previously. If the allegations are established against you, disciplinary action may result. You have the right to bring a representative with you to this meeting.*

[9] What is Mr Coutts referring to by *continued unsatisfactory performance* and previous warnings?

### **Performance counselling**

[10] On 11 February 2008 Mr Coutts and NRG's managing director Marcus Foot held a performance counselling meeting with Mr Riosa and another manager, Troy Freeson. Two issues of concern were raised – that the installation teams, for whom Mr Riosa and Mr Freeson were responsible, ought to be occupied at all times and were not and requests made of Mr Riosa and Mr Freeson were not carried out.

[11] On 13 February Mr Coutts held a further meeting with Mr Riosa and Mr Freeson to discuss these concerns in more detail. Mr Riosa and Mr Freeson accepted

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<sup>3</sup> Section 103A Employment Relations Act 2000

matters had not been well managed and specific action plans were drawn up and agreed.

[12] Mr Riosa's action plan provides:

1. *To visit each NRG franchise every 3 weeks ie, Auckland (x3), Wellington (x2), Taranaki, Manawatu, Christchurch (x2), Taupo and Waikato. The goal of this is to build on the relationships with the franchise owners and NRG Area Managers and improve running of each area.*
2. *To have a conference call with all NRG Area Managers (9) every second Monday.*
3. *To manage the administration of NRG.*
4. *To assist each Area Manager to ensure that their staff are kept busy if HRV work is not enough to full their days up ...*
5. *To use a diary system to ensure that tasks are not forgotten.*
6. *To employ a 24 hour response policy where all requests are responded to within 24 hours (in some cases this may not mean it is completed, but timeframes are provided within 24 hours).*
7. *To manage his Area Managers better (this will be done through the visits, and by constantly following up with Managers that requests have been actioned).*

[13] The goal of the process was expressed as support for Mr Riosa and Mr Freeson *to become successful managers*. A review meeting was scheduled for 27 February.

[14] Mr Coutts said he monitored Mr Riosa's performance over the following months and had several meetings to discuss his performance. NRG's activities were reorganised and Mr Riosa and Mr Freeson's duties were divided with Mr Riosa responsible for installation and Mr Freeson responsible for all electrical work.

[15] It is fair to say Mr Riosa was on notice from mid-February 2008 of specific concerns his employer held about his performance and the remedial action which needed to be taken.

### **Written warning**

[16] Mr Riosa was issued with a first written warning on 25 June 2008. The details of the warning are contained in a document completed by Mr Coutts and titled *disciplinary report*.

[17] In broad terms this warning concerned Mr Riosa failing to maintain the confidence of franchise holders and NRG's area managers – the disciplinary report

records Mr Riosa had failed to follow through with promises made, created a “them and us” attitude between the franchisee holders and NRG, did not work with a sense of urgency or attention to detail and did not have an accurate perception of what was happening in the business.

[18] Mr Riosa’s response (as recorded in the disciplinary report) was the business, along with his responsibilities, was three times the size at commencement, he had not been provided with the support he had requested, his work functions were not clear and the “them/us” attitude had been a feature of the business from the start. Mr Riosa had prepared and submitted a written response to the allegations.

[19] The disciplinary report does not state what specific findings were made having considered Mr Riosa’s explanation. Notwithstanding the warning was issued – I take from that the allegations were upheld. The document then lists specific improvement steps:

- *Set KPIs*
- *Define role description*
- *Provide extra training on “people management”*
- *Involve Mr Coutts all the time*
- *Commit to a 24hr turnaround time*
- *Follow up emails*

[20] Mr Riosa signed the disciplinary report by way of acknowledgement. He was on notice that his employment was in jeopardy – the disciplinary report states *any further instance of poor performance or misconduct may lead to the issuing of a further warning/dismissal*. The warning had a six month time frame.

[21] Mr Riosa did not challenge the first written warning.

### **Performance management subsequent to written warning**

[22] Having identified areas of performance concern, implemented a performance management plan and taken disciplinary measures what steps did NRG take to support Mr Riosa’s performance?

[23] Mr Coutts said he had daily contact with Mr Riosa and provided additional resources to assist Mr Riosa with projects he had been assigned. Mr Freeson left the business at about this time and a new employee was employed in July whose duties included the review and improvement of the Auckland region operations. Mr Coutts said the idea was to free Mr Riosa up to focus on building the regional business and that this was discussed with Mr Riosa.

[24] Mr Coutts also referred to a pay increase Mr Riosa had received in early June and a restructured bonus scheme. He said these steps were taken to motivate Mr Riosa. It was not clear whether this intention was discussed with Mr Riosa. Mr Riosa said it gave him a mixed message.

### **Disciplinary investigation**

[25] Returning to the September disciplinary letter. Attached to that letter was a list of specific areas of unsatisfactory performance which NRG wished to discuss at the scheduled disciplinary meeting:

**A) *People Management***

- *David Pringle complaint*
- *Kingi missing money – no written record of the incident, disciplinary process not initiated; money still not paid*
- *Failed to advise Financial Controller to lodge claim with insurance company*
- *Several cases of failing to follow recruitment procedures. A number of employees do not have employment contracts*
- *Failing to check visa/work permit before employing*
- *Nelson apprenticeship debarkle*
- *Ongoing complaints from other managers*
- *Throwing your own people under the bus when communicating with franchisees.*

**B) *Communication***

- *Failure to follow up and lack of feedback from your team. We are all left in the dark*
- *Very selective in what you say – you choose to tell what you think we want to hear*
- *Blaming others – unwilling to acknowledge and accept your own shortcomings*

**C) *Administration***

- *Don asked for paperwork, you could not find it and said you had nothing; a week later you turned up with a large file*
- *Ordering without signoff, stock, apparel and Telecom Yellow pages*

- *Apparel issue out of control*
- *Electrical stock in shambles*
- *Sub-contractors contract no where to be found*
- *Missing details in uniform register*
- *Ram's request for copies of warning letters – response was some stole it*
- *Supplier relationship formed without STM involvement*
- *Struggling to commit to KPI ad PD*

[26] The letter was delivered to Mr Riosa on 8 September by NRG's HR manager, Ramendra Narayan. Mr Narayan discussed the contents of the letter with Mr Riosa and the disciplinary process.

[27] Mr Riosa asked Mr Coutts to meet with him the following day. Mr Riosa was provided with further information about the issues including a copy of a complaint letter. Mr Riosa was given time off to prepare for the scheduled meeting on 11 September.

**(i) 11 September - meeting**

[28] Mr Riosa attended the meeting unrepresented. Mr Coutts and Mr Narayan attended for NRG.

[29] The discussion did not address the detail of the allegations and ended with Mr Riosa proposing three options for resolving issues between the parties – an exit package, Mr Riosa relinquishing his management position to take a waged role or a personal grievance.

[30] Mr Riosa says Mr Coutts asked him to come back with an exit package proposal. Mr Coutts says he asked Mr Riosa to detail the exit package so it could be considered along with the other options. By agreement the meeting was adjourned to 15 September.

[31] The 15 September meeting did not proceed – by this stage Mr Riosa had instructed counsel who wrote to NRG that day stating agreement had been reached that Mr Riosa's employment would end by way of exit package and outlining a proposed exit payment of about \$50,000. Mr Coutts replied the following day refuting any such agreement had been reached and proposing a meeting be scheduled

for Mr Riosa to provide a response to the disciplinary allegations. That meeting was held on 18 September.

**(ii) 18 September – dismissal meeting**

[32] Mr Riosa attended with counsel. Mr Coutts and Mr Narayan attended for NRG. Mr Riosa tabled a detailed response to the allegations which was discussed.

[33] Mr Coutts alleges that towards the end of this discussion Mr Cowan, counsel for Mr Riosa, said “it is clear that management has lost trust and confidence in Libby [Mr Riosa]” and “it is clear that Libby is not management material”. Mr Coutts says the discussion then shifted to the proposed exit package and that he told Mr Riosa the claim was unjustified and excessive. Mr Coutts expressed his concern that the waged position proposal could create difficulties within the team. A request for further information or submissions was then made of Mr Riosa, none was forthcoming and the meeting adjourned.

[34] During the adjournment Mr Coutts decided to dismiss Mr Riosa. He concluded he had lost confidence in Mr Riosa being able to perform his role adequately, that he had been given adequate opportunity to improve and he appeared to acknowledge he could not carry out the role.

[35] On resumption of the meeting Mr Coutts advised Mr Riosa of his decision to dismiss him with two weeks salary in lieu of notice.

**Justified dismissal?**

**(i) Substantive fairness**

[36] There can be no doubt that NRG had put Mr Riosa on notice that his performance was not meeting expectations. In broad terms the areas of concern were Mr Riosa was failing to adequately support the franchisees and area managers, his management of the installers was deficient and he was not open with his managers about the difficulties he was experiencing. These issues were set out in the February

counselling session, were the subject of the disciplinary warning issued in June and were the cause of his dismissal in September.

[37] There also can be little doubt that Mr Riosa accepted from an early stage that there were problems with his performance; he accepted the February action plan, he did not challenge the written warning issued in June and readily tabled options for resolving the issues between the parties.

[38] During the investigation meeting I asked Mr Coutts what specific findings lead to the decision to dismiss Mr Riosa for poor performance. He said the decision had been made because Mr Riosa's actions had lost NRG commercial business, was impacting negatively on NRG staff and franchisees and he could not be confident information Mr Riosa was providing was accurate.

[39] In his evidence to the Authority Mr Coutts put particular emphasis on the following specific issues – a complaint received on 10 September concerning Mr Riosa's management of two commercial electrical projects, Mr Riosa's management of NRG's uniform register and a complaint about Mr Riosa from a NRG area manager.

- Commercial electrical project

[40] This issue arose from the reorganisation of the business mid-year when NRG says Mr Riosa was freed up to build the regional business. The commercial electrical projects were the first NRG had undertaken for the large national building company in question. The complaint was that the workmanship provided by NRG was unprofessional and the projects had been mismanaged. Mr Coutts said no further work had been received from that building company.

[41] When Mr Coutts put this issue to Mr Riosa, specifically asking for the paperwork which he had been unable to find, Mr Riosa advised he had not prepared plans or detailed specifics and materials necessary for the project and had failed to provide detailed instructions or information to the area managers.

[42] At the investigation meeting Mr Riosa said he had not provided a written quotation for the project, that cabling was a variable on every job for which no fixed cost could be provided.

[43] I agree with Mr Coutts that Mr Riosa's explanation was less than could reasonably be expected of someone in his position. It was not unreasonable to expect the quotation given for the project would have been recorded and that there would be some paperwork around the specifications for the project.

- Uniform register

[44] Mr Riosa's responsibility for NRG's administrative systems had been emphasised in the February counselling meeting. Mr Coutts said he had from time to time during 2008 asked Mr Riosa to compile and keep a uniform register.

[45] In late August, in response to a query from the managing director, as to whether the uniform register had been created, Mr Riosa replied by email "*We have a current uniform register; copies are in my office and a file on "R" drive.*" What Mr Coutts found on the R drive was a template uniform register with no data. Mr Coutts put to Mr Riosa that he had misled the managing director by implying a uniform register existed, that his actions were deliberate and undermined his managers' confidence that what he told them was accurate.

[46] Mr Riosa relies on the fact the raw data was in his assistant's in tray ready to be imputed.

[47] I am satisfied there was no up to date uniform register on the R drive. This was the question the managing director put to Mr Riosa and he was entitled to an accurate answer which he did not receive.

- Area manager complaint

[48] NRG's area managers reported directly to Mr Riosa. On 5 September Mr Coutts was contacted by an area manager with a complaint that Mr Riosa was a poor communicator and had not provided him with adequate support or training. The

complaint was put in writing the same day, a copy of which was provided to Mr Riosa on 11 September. Mr Riosa provided his response in writing on 18 September – he had seen the area manager in question as often as he could, given his national responsibilities, that he was only a telephone call away and the area manager was not a good communicator which he accepted he had discussed with an NRG prospect.

[49] Mr Coutts said he considered Mr Riosa’s explanation, it was his word against that of the area manager and given the ongoing issues with Mr Riosa he preferred that of the area manager.

[50] These three specific allegations are illustrative of the ongoing performance issues with Mr Riosa. It is not necessary to detail the investigation of every issue other than to record I find Mr Riosa had a full opportunity to respond to the allegations and I am satisfied those allegations were fairly and fully considered by NRG.

[51] I am also satisfied that NRG was justified in finding Mr Riosa’s performance in the identified areas had not improved to a satisfactory level. Mr Riosa was on notice that his performance had to improve in the identified areas, he was supported to improve through close monitoring, business reorganisation and clarification of his terms and conditions, issues continued to arise after a reasonable period for improvement had passed. Following an investigation I find it was fair and reasonable for NRG to decide Mr Riosa’s employment would not continue.

**(ii) Procedural fairness**

[52] Mr Riosa says he was given insufficient time to improve his performance. He relies on the June written warning which has an expiry date of 2 December. He says he understood that was to be the date of his next performance review. I do not accept this was his understanding – the written warning does not say that and he did not assert this in his response to the disciplinary investigation.

[53] I find Mr Riosa was afforded a fair opportunity to address the performance concerns which had been drawn to his attention – NRG had issued a formal warning in June 2008, from then he attended a weekly meeting with senior management to

discuss the business, Mr Coutts raised issues with Mr Riosa as they arose and a reasonable opportunity was given to negotiate an employment agreement, position description and performance measures. I find it was reasonable for a disciplinary investigation to be convened in September because it is clear matters had reached a critical point.

[54] Mr Riosa says NRG predetermined his dismissal. He says an email to staff from Mr Coutts advising they are not to discuss Mr Riosa's employment issues with him and to report any discussion with Mr Riosa about these matters is evidence of predetermination. He says he was being backed into a corner when Mr Coutts made the payment of his bonus contingent on his agreeing to sign a proffered employment agreement, position description and key performance indicators (kpis).

[55] I find Mr Riosa's dismissal was not predetermined. Again, this was not asserted at the time of the disciplinary investigation. I accept Mr Coutts evidence that area managers had contacted him advising Mr Riosa had raised his employment issues with them. However, it is not evidence of predetermination; it is evidence of Mr Coutts trying to enforce some professional boundaries. In relation to the employment documents, I accept Mr Narayan's evidence that all Mr Riosa's changes to the documents had been incorporated. Whether the bonus was a term of the employment agreement will be dealt with below.

[56] Mr Riosa says there was no fair consideration of his response or the options that had been proposed. Mr Riosa said that he understood when the meeting adjourned that Mr Coutts was to consider the revised settlement proposal of \$20,000 Mr Cowan had made on his behalf and they would return with an offer but instead advised he was dismissed. Having read Mr Narayan and Mr Cowan's notes of the meeting and questioned the witnesses I do not accept Mr Riosa understood the meeting had adjourned to consider a settlement proposal.

[57] I find Mr Riosa's explanations were fairly considered – the allegations were fairly put, he provided a response, the notes of the disciplinary meeting record there was a discussion of those responses, including options for resolution and the meeting adjourned for consideration.

## **Profit share bonus**

[58] Mr Riosa asserts the bonus scheme was a term of employment.

[59] NRG says there was no bonus scheme in operation when Mr Riosa was employed and any bonus paid was at the discretion of the senior managers of the business. Mr Coutts gave evidence that the bonus scheme had changed several times over Mr Riosa's employment. He said at the time in question (from 1 June 2008) Mr Riosa's bonus was tied to achieving his kpis, that he had not met these and was not eligible for the bonus.

[60] The evidence was the bonus scheme had changed at least four times during Mr Riosa's employment. There was no evidence Mr Riosa had challenged any of these changes because they were terms of his employment and that agreement to the changes had been sought. I find the bonuses scheme was not a term of Mr Riosa's employment. The claim fails.

## **Overpayment**

[61] NRG seeks recovery of an alleged overpayment of \$11,818.28 in bonuses paid to Mr Riosa.

[62] The alleged over payments are asserted but there was no explanation as to how or why they came about. Given the payment of bonuses was an exercise of discretion the evidence provided is insufficient to support the claim and amounts to little more than a bare assertion. More than that is necessary to trigger further investigation by the Authority.

## **Conclusion**

[63] For the foregoing reasons I find NRG's dismissal of Mr Riosa, on an objective basis, was fair and reasonable. The other claims are not successful.

## **Costs**

[64] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If these attempts are unsuccessful then application should be made for a costs timetable to be set within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority