

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 95  
5498281

BETWEEN                      DINESH SOOD  
   Applicant

A N D                              SUPER FINANCE LIMITED  
   Respondent

Member of Authority:      Rachel Larmer

Representatives:            Thuzar Henry-Win, Advocate for the Applicant  
   Danny Gelb, Advocate for the Respondent

Investigation Meeting:      19 February and 11 March 2015 at Auckland

Submissions Received:      12 March 2015 from the Applicant  
   13 and 16 March 2015 from the Respondent

Date of Determination:      30 March 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Super Finance Limited's (Super Finance's) dismissal of Mr Dinesh Sood is unjustified.**
- B. Super Finance is ordered to pay Mr Sood:**
- (a) Lost remuneration from the date of dismissal to the date of this determination (to be calculated by the parties);**
  - (b) Holiday pay (to be calculated by the parties) on lost remuneration;**
  - (c) \$10,000 distress compensation;**
- C. Super Finance is ordered to pay Mr Sood wage arrears of:**
- a. \$2,573.62 unpaid commission for February and March 2014;**

**b. Commission on sales in the Mangere store (to be calculated by the parties);**

**c. Holiday pay (to be calculated by the parties) on the commission Mr Sood is owed.**

### **Employment relationship problem**

[1] Mr Dinesh Sood commenced employment with Super Finance on or around 25 June 2012. Super Finance trades as Hire Purchase (HP) Stores in Otahuhu, Glenn Eden, Papakura, Manurewa and Mangere. Super Finance also trades as Best Bargain and Direct Selling businesses.

[2] Mr Sood was initially employed as the Business Manager for the then newly opened Otahuhu HP Store. In March 2013 Mr Salem Raza, who along with his wife is a director and shareholder of Super Finance, promoted Mr Sood to the role of General Manager of Super Finance. The Manurewa and Mangere HP stores were opened while Mr Sood was General Manager.

[3] Mr Sood remuneration's included a commission component which was changed by agreement in mid-October 2013. These changes involved increasing the monthly sales targets by \$320,000 before Mr Sood would receive commission and also removing some of the commission elements Mr Sood had previously earned from the Best Bargain and Direct Selling businesses as well as increasing the debt collection targets that had to be met before commission was payable.

[4] The new commission arrangements were recorded in writing and stated to take effect from 1 November 2013. Although Mr Sood was unhappy with the commission changes he went along with the changes Mr Raza wanted to make. Mr Sood says he did so because Mr Raza indicated that if the HP stores were achieving sales targets then more stores would be added to the chain so Mr Sood would be compensated through the commission he earned across the increased number of retail stores.

[5] Mr Sood claims wage arrears for unpaid commission. He was not paid while on annual leave during February and March 2014 and he did not receive commission for sales in the Mangere store in March and April 2014. Mr Raza says Mr Sood is not entitled to commission when on leave and that Mr Sood was not responsible for the Mangere HP Store so is not entitled to commission for its sales.

[6] Mr Raza did not dispute any of the financial information Mr Sood presented to the Authority. I therefore accept that under Mr Sood's tenure sales volume doubled for the financial year 2013-2014, two new retail stores were added to the chain, and debt collection figures also rose substantially. Mr Sood says his figures show that the directors would have generated a seven figure net profit for the financial year ended 31 March 2014.

[7] In April Super Finance decided to disestablish the General Manager position. This effectively involved disbursing the responsibilities of that role to Mr Raza and three other existing employees. Mr Sood was dismissed on the ground of redundancy on 11 April 2014.

[8] Mr Sood claims his dismissal was procedurally and substantively unjustified. He believes the restructuring was a sham device used to exit him from the business.

[9] Super Finance says it undertook a genuine restructure during which it identified it could reduce staff costs by disestablishing the General Manager position. It says it followed a fair and proper process.

### **Issues**

[10] The following issues are to be determined:

- (a) Was Mr Sood's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) Is Mr Sood owed unpaid commission?
- (d) What if any costs should be awarded?

### **Was Mr Sood's dismissal justified?**

[11] Justification is to be assessed in accordance with the statutory justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether the way in which Super Finance acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Sood was dismissed.<sup>1</sup>

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<sup>1</sup> Section 103A(2) of the Act.

[12] The Court of Appeal in *Grace Team Accounting Ltd v. Brake*<sup>2</sup> recognised that the reference in s.103A of the Act to a “*fair and reasonable employer*” is not to be read down to mean “*a genuine employer*” (which in *GN Hale & Son Ltd v. Wellington Caretakers IUOW*<sup>3</sup> was referred to as an employer who is not using redundancy as a pretext for dismissing a disliked employee).<sup>4</sup>

[13] The Court of Appeal in *Grace* and the Employment Court in *Rittson-Thomas t/a Totara Hills Farm v. Davidson*<sup>5</sup> make it clear that the employment institutions are to assess whether what was done by the employer, and how it was done, were what a fair and reasonable employer could have done in all the circumstances at the time.<sup>6</sup>

[14] An element of assessing justification includes determining the genuineness or otherwise of a redundancy decision. The Court of Appeal in *Brake* recognised that the employment institutions cannot discharge their responsibility by merely agreeing that if an employer considers a redundancy was reasonable then that must objectively be the case.

[15] Section 103A of the Act requires the employment institutions to objectively assess whether or not the actions of a particular employer meet the “*fair and reasonable employer*” standard required under the Act.<sup>7</sup> This is an objective standard involving an assessment of what a fair and reasonable employer could have done in all the circumstances. It does not involve substitution of the employment institutions’ subjective view.

[16] Super Finance bears the burden of establishing on the balance of probabilities that its actions and the manner in which it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Sood was made redundant.<sup>8</sup>

[17] I find that Super Finance has failed to discharge this burden. I am not satisfied to the required standard that Super Finance’s decision was substantively justified or that it conducted itself in a procedurally fair manner before reaching that decision.

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<sup>2</sup> [2014] NZCA 541

<sup>3</sup> [1991] 1 NZLR 151 (CA)

<sup>4</sup> Ibid para.[80]

<sup>5</sup> [2013] NZEmpC 39, [2013] ERNZ 55

<sup>6</sup> Prior to 2011 the test was “would” not “could”.

<sup>7</sup> Ibid 6, para[89].

<sup>8</sup> Ibid 1.

[18] I find that Super Finance breached its s4(1A) good faith obligations to Mr Sood because it failed to provide Mr Sood with:

- i. information relevant to its decision to disestablish his General Manager position which impacted on his ongoing employment;  
or
- ii. an opportunity to comment on relevant information before it decided to dismiss him.

[19] I am also not satisfied to the required standard that Super Finance complied with any of the four procedural fairness tests in s.103A(3) of the Act which set minimum standards of procedural fairness that employers are expected to meet. The failure to follow a fair process also undermines Super Finance's ability to substantively justify its decision to dismiss Mr Sood because a fair and proper process may have resulted in a different outcome.

[20] I do not consider this was not a situation where Mr Sood's redundancy dismissal was inevitable had a fair and proper process been carried out.

[21] A fair and reasonable employer is expected to comply with its statutory obligations. Super Finance's failure to do so undermines its ability to justify its dismissal of Mr Sood because how it "*acted and its actions*"<sup>9</sup> were not what a fair and reasonable employer could have done in all the circumstances at the time Mr Sood was dismissed.

[22] I am not satisfied on the balance of probabilities that Super Finance made a genuine commercial decision to disestablish Mr Sood's position. It seems more likely that the dismissal was improperly motivated by Mr Raza forming an adverse view of Mr Sood.

[23] Mr Raza took the opportunity of Mr Sood being out of the country on annual leave in February and March to secretly prepare a "*Feedback on General Manager's Role in the Business*" document which Mr Raza hand delivered to selected employees while Mr Sood was away. The document posed 23 multiple choice questions about Mr Sood and it also had a comments section for additional feedback.

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<sup>9</sup> Ibid 1.

[24] Mr Raza considered the feedback responses were unfavourable about Mr Sood. I do not accept Mr Raza's evidence that his concerns about the feedback played no part in his decision to restructure the business.

[25] The manner in which this document was prepared and circulated by Mr Raza was inconsistent with the performance appraisal process Mr Sood had implemented and which all staff were aware of. It was also done secretly and Mr Sood was not given any information about it. He only found out about it by accident after he had been dismissed when one of the employees he used to manage mentioned it.

[26] Mr Raza expressed considerable concern to the Authority about the low level of B sales. There are two categories of sales (A sales and B sales). A sales are financed through a finance company (approximately 90% of sales) while B sales refer to sales to customers who have a poor credit history so are declined finance from finance companies (approximately 10% of sales). Super Finance finances in house the B sales which it makes high margins on, so Mr Raza was keen to get as many B sales as possible.

[27] On 11 February Mr Raza raised concern to Mr Sood about the downward trend in B sales. Mr Sood reassured Mr Raza that would be changing because he had just started linking salespersons performance targets to B sales and the stores had just started selling cell phones which were sought after by B sales customers. Mr Sood told Mr Raza to give it some time to see the effects of those very recent changes.

[28] I find that Mr Raza was not happy about that response as he felt Mr Sood did not understand the concern and was not taking it seriously enough.

[29] On 18 March 2014 after Mr Sood returned from leave he and Mr Raza met for coffee. There is a dispute about who said what to whom but I find on the balance of probabilities that Mr Raza used the opportunity to make adverse performance related comments about Mr Sood and to reiterate concerns about decreasing B sales.

[30] Mr Sood says that Mr Raza told him (Mr Sood) that his performance was lacking and he had not achieved anything significant over the year he had been General Manager. This was a view that Mr Sood believed was unsubstantiated as he had considerable financial information to show the business was doing very well.

[31] During this meeting Mr Raza also said he wanted to remove Mr Sood's sales duties and give them to a newly created Sales Manager position. Mr Raza told Mr Sood his commission would be removed for him to fund the new Sales Manager position and that because Mr Sood would not be doing sales he would just receive his current salary.

[32] Mr Sood expressed his unhappiness at that idea and pointed out it would almost halve his remuneration. Mr Sood also pointed out that he had exceeded his targets for every month he had been General Manager and that he only received commission if targets were met.

[33] Mr Sood also disputed the information that Mr Raza was relying on regarding the B sales. Mr Sood asked Mr Raza to provide him with the basis on which he had made his B sales calculations as it didn't seem to accord with the information Mr Sood had available to him. Mr Raza never provided Mr Sood with that information.

[34] Mr Sood claims Mr Raza told him he had to accept the removal of his commission or he would not receive any commission for the new Mangere store. The conversation ended abruptly with Mr Sood saying he would be taking legal advice. I find that Mr Raza was very unhappy with Mr Sood's response which he believed was aggressive.

[35] The next day Mr Raza told Mr Sood that the new Mangere store would not be his responsibility and that the new Manager of that store would report directly to Mr Raza. Mr Sood expressed his unhappiness about that as all other store managers reported to him and he was the only person within all of the company structures who had a direct reporting line to Mr Raza.

[36] Mr Sood told Mr Raza that as General Manager he was responsible for leading all of the retail stores so he considered the new Mangere store came within his responsibilities. Mr Sood also told Mr Raza that if he had a problem with his (Mr Sood's) performance then he had to be transparent about it and he had to give Mr Sood sufficient time to show the desired results.

[37] Mr Sood had agreed to the removal (and therefore reduction in his commission) of his responsibility for Best Bargain and debt collection in October 2013 on the understanding he would be focusing on growing the business and as that

occurred his commission would accordingly increase provided the applicable targets were met. Mr Sood did not accept that he was not responsible for the Mangere store.

[38] On 19 March 2014 Mr Sood, Mr Raza (and others) met with Mr Gernhoefer regarding the implementation of new systems and processes that Mr Sood had been liaising with Mr Gernhoefer about over the last year. Mr Raza instructed Mr Gernhoefer not to send anything to Mr Sood and told him everything was to be sent directly to him (Mr Raza) because there was going to be organisational changes.

[39] Mr Sood had been directly dealing very closely with Mr Gernhoefer for the past year so this was a surprising instruction. Mr Gernhoefer asked Mr Sood what was going on that had caused Mr Raza to decide to remove Mr Sood from the implementation projects he had spent so much time working on.

[40] The first restructuring proposal was given to Mr Sood a few days later (24 March). This records Mr Raza's belief that the General Manager role had not lifted the profitability and effectiveness of the business as anticipated. Mr Sood disputed that.

[41] Mr Sood pointed out that two new stores had been opened, monthly targets had been met every month, new inventory and stock management systems had been implemented together with a new payroll system, performance appraisals and staff training had increased sales across the stores.

[42] When Mr Sood asked for information to support the claims made in the first restructuring proposal because he believed he had extensive data to prove the information relied on was incorrect, Mr Raza's response was to change the proposal (I discuss this later).

[43] The restructuring proposal also referred to a "*review*" of the business having been undertaken. Mr Sood says he was surprised that Mr Gernhoefer who was Super Finance's external accountant had not been involved in any business review. Nor had Mr Sood been aware that a review had been conducted. He had no input into it and did not receive any information about it.

[44] It was surprising that Mr Sood, as General Manager and as the person who had total overview of all aspects of all the business and stores, was not asked to contribute

or comment on the review before a restructuring process was commenced. I am also surprised by Mr Raza's evidence that there were no document regarding the review.

[45] I do not consider a fair and reasonable employer could conduct a review which resulted in the disestablishment of a General Manager position without any documentation.

[46] Mr Sood made continual requests throughout the process for information about the review and in particular what information it had been based on but he did not receive any information in response to his queries. It was unfair and unreasonable for Super Finance not to share what information it had based its review on particularly when Mr Sood was raising concern about the accuracy of the information it had relied on.

[47] From the outset Mr Sood raised concerns about the inadequacy of the information regarding the calculations which had been used in the various restructuring proposals. He reiterated these concerns throughout the entire process. I find that Super Finance was non-responsive to Mr Sood's legitimate concerns and it did not provide the requested information. Super Finance never replied to Mr Sood's concerns that the payroll costs were out by approximately \$50,000 and that the structure chart was incorrect.

[48] I do not consider it was fair or reasonable for Super Finance to fail to provide Mr Sood with the information he had requested on the grounds such information was confidential company information.

[49] Mr Sood, as General Manager, had access to all company information including all earnings and remuneration for all staff. He had very detailed financial information about every aspect of the business. There was no good reason for Super Finance not to provide Mr Sood with the information he had requested.

[50] Mr Raza admitted to the Authority that he decided to change the basis of the restructuring because he was advised that doing so meant he would not have to give Mr Sood the information he had sought.

[51] The second restructuring proposal was given to Mr Sood on 07 April 2014 and it records that the proposal is based on "*costs savings*". I find that the information to support a restructuring on this basis was minimal. Mr Sood was told that the

preferred option would involve costs savings of \$85,000 but he was not given information as to how these savings were calculated, despite requesting that information.

[52] It is difficult to see how Mr Sood could have adequately prepared a response in the absence of understanding why savings were required, what level of savings was sought, and how the proposed savings had actually been calculated. I consider it unreasonable and unfair of Super Finance to not provide Mr Sood with this basic information. I find Mr Sood was unfairly and unreasonably prejudiced by this substantial failure.

[53] I am also not satisfied that the restructure did actually result in the savings Super Finance communicated to Mr Sood during the consultation process. The decision to disestablish the General Manager's position resulted in these duties being transferred to three existing staff and to Mr Raza. Super Finance did not identify any tasks Mr Sood had been undertaking that were no longer required.

[54] Super Finance does not appear to have done any analysis on what capacity existing employees had to pick up some of the General Manager's tasks or even on the suitability of such employees to take on such duties.

[55] Mr Raza declined to tell the Authority what he paid two of the staff who received some of Mr Sood's duties. Both of these individuals told the Authority they received pay increases as a result of the restructure. Mr Raza admitted he would be compensated for the time he had spent doing the General Manager duties but he did not tell the Authority what that amount was. That costs does not appear to have been factored into the restructuring proposal.

[56] I note that Mr Sood's specific concerns about the restructuring proposal were not responded to. Mr Sood was just advised that his position would be disestablished and his tasks were effectively moved to others to do.

[57] I find that the serious deficiencies around the lack of information mean that Super Finance is unable to satisfy me to the required standard that any of the four procedural fairness tests in s.103A(3) were complied with.

[58] I am not satisfied that Super Finance "*sufficiently investigated*" its concerns contrary to s.103A(3)(a) of the Act because it did not involve Mr Sood in the review

of the business and it was not clear what it was concerned about, what it wanted to achieve (other than ‘costs savings’) or why it believed a restructure was desirable.

[59] I consider Super Finance did not raise its concerns contrary to s.103A(3)(b) of the Act because it did not adequately or appropriately engage with Mr Sood about the matters it was concerned about. I find that effectively deprived Mr Sood of a “*reasonable opportunity*” to respond to Super Finance’s rationale for the restructuring contrary to the requirements of s.103A(3)(c) of the Act.

[60] I also consider Super Finance failed to “*genuinely consider*” Mr Sood’s feedback contrary to s.103A(3)(d) of the Act because it did not engage with him about the issues he had raised and it did not address his view that the information Super Finance was relying on was incorrect.

[61] I find that s.103A(5) of the Act does not preclude a finding of unjustified dismissal because the process errors were not minor and did result in substantial unfairness to Mr Sood.

### **What if any remedies should be awarded?**

#### *Mitigation*

[62] I am satisfied that Mr Sood has appropriately mitigated his loss. He says he has applied for more than 180 jobs in the last 10 months. Despite actively seeking employment and being well qualified with good experience Mr Sood has been unable to find work.

[63] Mr Sood attributes that to the difficult questions he has faced from potential new employers and from recruitment agents as to why he was made redundant if the company he was General Manager of was expanding and growing at the rapid rate that it was. Mr Sood said potential employers are not attracted to senior employees who are engaging in litigation with their former employer.

#### *Lost remuneration*

[64] Mr Sood says he has not earned any money since his dismissal. I am satisfied that Mr Sood has lost remuneration as a result of his unjustified dismissal and he is entitled to be compensated for it. I award Mr Sood his actual lost remuneration from

the date of dismissal to the date of this determination. I do not have the information to enable me to set that amount.

[65] The parties are encouraged to calculate and agree on this figure if possible. If agreement has not been reached within 14 days of the date of this determination then either party may apply to the Authority to fix the amount of lost remuneration Mr Sood is to be paid.

[66] These calculations will need to reflect that Mr Sood received two weeks' salary in lieu of notice (so a deduction needs to be made for that). They should also include 8% holiday pay on the amount of total gross lost remuneration that has been awarded.

#### *Distress compensation*

[67] I accept Mr Sood's evidence about the emotional, financial and physical distress he has suffered. To preserve Mr Sood's privacy I do not intend to traverse the evidence he provided to the Authority. I recognise that he has been extremely humiliated by his unjustified dismissal and he has suffered emotionally and financially from being without work.

[68] I order Super Finance to pay Mr Sood \$10,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, injury to feelings and distress he has suffered as a result of his unjustified dismissal.

#### **Is Mr Sood owed unpaid commission?**

##### *Is Mr Sood entitled to commission?*

[69] I do not accept Super Finance's submission that Mr Sood was not entitled to commission while he was on leave. The commission structure was set by Mr Raza and recorded by him in writing, which Mr Sood then subsequently agreed to.

[70] The written record of the agreed commission structure does not make any reference to the fact that Mr Sood would not be paid commission while on leave. In the absence of such an express limitation I am not prepared to read one in retrospectively.

*What if any commission is Mr Sood owed?*

[71] Mr Raza accepts that if commission is payable then there is a shortfall in commission of \$952.09 for February 2014 and \$1,621.53 for March 2014. This accords with Mr Sood's calculations. Super Finance is ordered to pay Mr Sood \$2,573.62 commission arrears for February and March 2014.

[72] I find that Mr Sood is entitled to commission as per the written commission structure<sup>10</sup> for April 2014. I do not have sufficient information to enable me to calculate the amount owed so the parties are encouraged to agree that amount based on the actual sales that occurred that month. If agreement is not reached within 14 days of the date of this determination then either party may apply to the Authority to set that amount.

[73] I find that Mr Sood is entitled to commission as per the agreed commission structure for sales in the Mangere store during March and April 2014. I do not accept Mr Raza's evidence that as General Manager Mr Sood was not responsible for the new Mangere store so should not receive commission. The Mangere store was one of Super Finance's businesses and Mr Sood was General Manager of Super Finance.

[74] The company memorandum sent to all staff on 04 April 2013 states that Mr Sood's "*job role would be comprehensive and widespread to all stores and outlets*". Mr Sood was expected and required, as General Manager, to expand the chain of stores and he was involved in setting up the Mangere store.

[75] It was shortly after Mr Sood advised Mr Raza that he would be seeking legal advice over changes to his commission that Mr Raza told Mr Sood that he (Mr Sood) was not responsible (and therefore would not get commission) for sales in the Mangere store.

*Holiday pay on commission*

[76] Mr Sood is entitled to 8% holiday pay on the total gross unpaid commission that Super Finance owes him. The parties are encouraged to agree this amount but if that is not possible within 14 days of the date of this determination then either party may apply to the Authority to set this amount.

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<sup>10</sup> Page 18 of Applicant's bundle of documents used at IM.

**What if any costs should be awarded?**

[77] Mr Sood as the successful party is entitled to a contribution to his actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible Mr Sood is to file a costs memorandum within 14 days of the date of this determination, Super Finance has 14 days within which to respond with Mr Sood having a further three working days within which to reply.

[78] The Authority is likely to adopt its usual notional daily tariff-based approach to costs. The parties are invited to identify any factors which they say should warrant any adjustments being made to the current notional daily tariff of \$3,500.

[79] Mr Sood's costs application must be supported by proof of his actual costs and any disbursements he is claiming.

**Rachel Larmer**  
**Member of the Employment Relations Authority**