

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tony Sangster (Applicant)
AND Tanner Group Limited (Respondent)
REPRESENTATIVES Jo Douglas, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 4 April 2005
SUBMISSIONS RECEIVED 11 and 14 April 2005
DATE OF DETERMINATION 26 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Tony Sangster has complained to the Authority about certain actions of his former employer, the respondent Tanner Group Ltd (referred to as "TGL"). Mr Sangster complains that TGL's actions were carried out in breach of his employment agreement, causing disadvantage in his job and eventually forcing him to resign.

[2] The employment relationship problem had its origins in three related events that occurred during the second half of 2004. The first event was the relocation of the employer's Head Office where Mr Sangster had been working, from Papatoetoe in South Auckland to Kerepehi on the Hauraki Plains. He remained employed and after the move on 1 August his job as Group Financial Controller did not change. However his travelling time increased by between two and three hours, because Kerepehi by road was about 200kms there and back from his suburban Auckland home.

[3] The second event that added to the problem was the action of the employer on 20 August 2004 in raising with Mr Sangster a number of concerns about his performance. Several of these were about the way he had carried out his duties as Group Financial Controller. One of the concerns was in relation to a drop in Mr Sangster's hours of attendance at work during the three weeks following the office relocation. The employers concerns were not dispelled by Mr Sangster's response to them and a formal disciplinary investigation was commenced by TGL in mid-September. However Mr Sangster resigned before TGL could complete that investigation and announce to him any final conclusions reached about his performance or any disciplinary action to be taken in that regard.

[4] Stress caused Mr Sangster to take leave from work from mid-September 2004. He did not

return, although he did attend two further disciplinary meetings with his employer and a mediation which was arranged after he had raised a personal grievance on 13 September 2004.

[5] In his grievance, the first of two, Mr Sangster complained that he had been unjustifiably disadvantaged in his employment as a result of the relocation of his workplace to Kerepehi. He alleged that in making this change TGL had purported to unilaterally vary his employment agreement. Mr Sangster also complained that the commencement of the disciplinary investigation was an unjustified action against him.

[6] The third related event of significance was the resignation of Mr Sangster on 13 December 2004. He raised his second personal grievance at the same time, complaining that he had been constructively dismissed by unjustified actions of the employer in relation to both the relocation of his workplace and the disciplinary investigation into his performance.

Remedies sought

[7] As a remedy in relation to the relocation of his workplace, Mr Sangster seeks compensation or reimbursement equivalent to the amount payable under the parties' written contract of employment. Under that contract if employment ceases through "no fault" of the employee, there is an express entitlement to a payment "in lieu of any form of redundancy." He also seeks compensation for humiliation, hurt feelings and distress suffered by him.

[8] As a remedy for his contended dismissal Mr Sangster seeks reimbursement of wages lost and compensation for humiliation, hurt feelings and distress suffered by him in consequence of the employer's unjustified actions. He also seeks compensation for the loss of benefits expected under his employment agreement. These include the "no fault" termination payment, a company car and cell phone he had the use of, and also 44 days annual leave that was used up while he was absent from work through illness.

Responsibility for what happened

[9] For reasons that will be explained I conclude that up to the time Mr Sangster commenced reporting for work at Kerepehi, TGL had no responsibility for any employment relationship problem encountered by him. As demonstrated by his own actions, the position of Group Financial Controller was not in fact redundant in the circumstances.

[10] I also conclude that TGL had no responsibility arising out of the conduct of the meeting of 20 August at which the employer raised its concerns with Mr Sangster. This was not a disciplinary meeting. I find however that a fortnight or so after that meeting when TGL made its concerns the subject of a disciplinary investigation, it acted unfairly and unreasonably. This I find was only in respect of TGL's concern about Mr Sangster's hours of work. TGL acted without justification in invoking a disciplinary process to address that particular concern, as it should more properly have become the subject of a dispute about the application or operation of the employment agreement. There was also no basis for disciplinary action to be found in anything Mr Sangster did after the 20 August meeting with regard to his hours of attendance.

[11] In this regard Mr Sangster I find was disadvantaged in his employment by an unjustifiable action of his employer.

[12] I find that the other performance concerns raised against Mr Sangster were reasonably and genuinely held by the employer and it therefore had a proper basis for commencing the disciplinary investigation in respect of them. I consider that TGL acted fairly in its conduct of that

investigation and that in the circumstances it was not an unreasonably expanded or prolonged process.

[13] Finally, I conclude that the main cause of Mr Sangster's resignation was the advice given to him by TGL that it wished to complete the disciplinary process and make a decision about the allegations it had been investigating. I do not consider that the employer's particular concerns about hours of work which were included in that investigation, were a significant influence in Mr Sangster's decision to resign.

[14] I find that his resignation was not caused by a breach of duty. Even if there was such a breach by the employer in its handling of the hours of work issue, it was not a breach of sufficient seriousness that made it reasonably foreseeable to TGL that Mr Sangster would no longer put up with the conditions of his employment.

[15] Mr Sangster did not contribute to the situation that gave rise to his disadvantage grievance. He is entitled to compensation for hurt feelings through having his employment made less secure by the conduct of a disciplinary process in respect of his hours of work.

[16] My reasons for these conclusions and findings are as follows.

The resignation letter

[17] In her letter of Monday 13 December notifying his resignation, Ms Douglas on behalf of Mr Sangster put forward the view that TGL had followed a course of conduct intended to force her client to resign. She explained that view in the following way;

Tanner Group is suffering significant financial difficulties, and rather than recognise that our client's position is redundant and pay to our client the sums owed under his employment contract, Tanner Group has chosen to take disciplinary action with the intention of either dismissing our client for unsubstantiated performance allegations, or alternatively, put enough pressure on our client until he resigns.

[18] In this letter it was also asserted on behalf of Mr Sangster that the real issue within his employment was the redundancy of his position as Group Financial Controller. It was asserted that the disciplinary proceedings were commenced by TGL to avoid having to properly address that issue. There is no dispute that if Mr Sangster had been made redundant he would have been contractually entitled to about \$33,000 as a payment for a "no fault" termination.

Relocation of Head Office – a redundancy situation

[19] There is no dispute that the relocation of the TGL Head Office from Papatoetoe to Kerepehi about 90kms away, gave rise to a redundancy situation generally for staff affected by that move. The evidence of Mr Alan Tanner the Chief Executive of TGL about this was as follows;

The company had regarded the relocation as amounting to a redundancy for staff, and some were terminated for redundancy reasons when they were unable to make the move.

[20] In principle that situation also existed for Mr Sangster, as Mr Tanner confirmed in his further evidence that;

Mr Sangster had no reason to believe he would have been regarded any differently.

[21] According to Mr Tanner however Mr Sangster was not terminated for redundancy, because;

.....he made it clear by his conversations and actions that he intended to stay beyond the relocation, and he was fully aware that I was receptive to his working for a couple of days per week from Auckland if that suited him. I had at various times offered to provide him with timber to make alterations to his home, or to lease office space in Auckland for him to use. He did not take up these offers but instead relocated without apparent difficulty.

[22] I find that the relocation to Kerepehi was a change necessitating the formation of a new or amended employment agreement for which Mr Sangster's consent was needed. To comply with s.65 of the Employment Relations Act 2000 a new agreement was required to be in writing which recorded, amongst other things, "an indication of where the employee is to perform the work" and, "an indication of the arrangements relating to the times the employee is to work."

[23] Any amendment to the 1998 contract was also required by one of its express terms to be written and signed by the parties. In accordance with that requirement at least one variation had been effected in writing.

[24] TGL contends that although it was not evidenced in writing, Mr Sangster's consent to commencing in the relocated position of employment was given by him tacitly or by conduct having the effect of affirming a variation to his employment agreement.

[25] I find from the evidence that Mr Sangster by words or conduct did accept a position of employment with TGL at Kerepehi. That position was Group Financial Controller, the same one he had held when the Head Office had been at Papatoetoe. As a consequence of his acceptance of it, Mr Sangster's position was not in fact redundant. TGL did not have to terminate Mr Sangster's services, as was demonstrated by his continuing to work for the company at Kerepehi in the same role as before.

[26] In support of the above conclusion I find that Mr Sangster had been present at TGL directors meetings on 13 February 2003 and 1 April 2004 in particular, when the move to Kerepehi was discussed. As the minutes of it record, at the latter meeting the Board authorised the relocation of the Head Office to Kerepehi and required this to be carried out in conjunction with Mr Sangster as the financial controller. There is no indication of any objection or concern being raised by Mr Sangster.

[27] I find that Mr Sangster for several months before it happened had clear notice of the relocation to Kerepehi, a move which he also helped organise and oversee without raising any objection or concern. He was fully aware before the relocation that redundancy arrangements were being made with staff not wanting to move, yet he raised no objection or concern about making the move himself and he did not seek redundancy arrangements for himself.

[28] I do not accept that he had no real opportunity to provide his views as to how he might be affected personally by the relocation. He was a senior manager in a relatively small and close knit Head Office team which included Ms Heather Wark, the Group Human Resources Manager for TGL.

[29] I accept from Ms Wark, who relocated and remained with the company, that she and Mr Sangster had from time to time before August 2004 discussed the move and the practical implications of it for each of them personally. Mr Sangster I accept gave no indication that he had a

problem with it. I accept from Ms Wark her evidence that;

I have always found Tony to be a clear communicator so if he had not wanted to relocate and had wanted to be made redundant, I would have expected him to tell me or Alan [Tanner] that. He never said anything of that kind to me.

[30] I also accept Mr Tanner's evidence in this regard and find that before 1 August it was reasonable for him to believe that Mr Sangster did not have a problem with the relocating of his place of work. Mr Sangster had been made reasonable proposals by Mr Tanner for relieving some of the burden of the increased travel, but he had not wished to respond to those or explore them further. Mr Tanner had proposed that for part of each week Mr Sangster could work for TGL from Auckland, using a room set up in his house or alternatively an office rented by the company.

[31] Mr Sangster agreed in his evidence that he had not said to TGL that he would not move or that he did not want to move. He also agreed that before the move he had not suggested to his employer that he should be made redundant. I do not accept Mr Sangster's evidence that he had "no choice" but to move because of the way the TGL directors had presented the move as a fait accompli. I find that for his own good reasons Mr Sangster decided to stay with TGL and adjust to the relocation of the Head Office.

[32] Mr Sangster must be taken to have known well in advance of the move that his travel time would significantly increase as a result of the relocation. He must be taken to have been fully aware, like most other Auckland motorists, of the local road conditions he was likely to encounter on the journey to Kerepehi and back. With this knowledge and despite any misgivings he may have had, by working at the new location Mr Sangster acquiesced in the change to his employment that arose from the move. His acquiescence was evident from his daily attendance at Kerepehi after 1 August 2004 until about 13 September, when he went away on sick leave.

[33] Up to that point in time both Mr Sangster and TGL had regarded their relationship as a continuing one. TGL had not had to terminate the employment and TGL could not have been made by the Authority to declare Mr Sangster redundant in the circumstances. It is possible that that situation might have been reached at a future time, but this matter became overtaken by the commencement of the disciplinary investigation. In turn the completion of that investigation was overtaken by Mr Sangster's resignation, and because of these intervening events the sustainability of his position of employment did not arise again as a practical issue.

[34] I consider that because Mr Sangster took the erroneous view that he was redundant he failed to appreciate the true purpose of the disciplinary investigation, which was to examine and consider concerns that the employer reasonably and genuinely held about his performance. It is in respect of one of those concerns only, about hours of work, that I find a personal grievance arises.

Hours of work

[35] From soon after the time Mr Sangster started attending at Kerepehi he did, I find, make known to Mr Tanner his dissatisfaction with his terms of employment in relation to hours of work. I accept Mr Sangster's evidence that he made known his view that he should be compensated in this respect. By his conduct he also demonstrated that he had not accepted the retention of the original Hours of Work provisions. Mr Tanner came to believe soon after the relocation that Mr Sangster was leaving the office at 4.30 pm. to compensate for some of his increased travel time.

[36] The original Hours of Work provisions had stipulated 8.30am to 5pm, with a requirement to work additional hours on occasions when that was necessary to enable the job to be performed

effectively. Mr Tanner told the Authority that he had not expected Mr Sangster to work the same hours at Kerepehi as he had at Papatoetoe. As a reasonable employer TGL should have tried to reach agreement with Mr Sangster about his hours of work rather than threaten disciplinary action over the issue.

[37] On 20 August, Mr Tanner clearly raised hours of work as one of the concerns he had with Mr Sangster. The response he got should have left Mr Tanner in no doubt that this was a matter that remained outstanding after the relocation and a matter that required settlement. Instead it became a disciplinary matter which remained unresolved at the time Mr Sangster resigned. It is all the more surprising that it was seen as a disciplinary matter given the evidence of Mr Tanner that after their 20 August discussion Mr Sangster had gone from one extreme to another with his hours of work by staying on at the office until 6 or 6.30 pm. In the circumstances I find there was no reasonable basis on which TGL could make this a disciplinary matter.

[38] The circumstances raise similar points of law to those discussed in *Sky Network Television v Duncan* [1998] 1 ERNZ 354, at page 361. The Employment Court held in relation to an employment agreement;

.....where both parties have genuinely contested positions as to the meaning of the contractual term this should not entitle the employer to dismiss the employee in order to enforce its view.

[39] The same must be true where the parties are in dispute about the application or operation of a contractual term, as was the case between TGL and Mr Sangster. It follows from what the Court said above that if dismissal is unjustified in the given circumstances, so too must be action threatening dismissal or other disciplinary consequences. In its letter of 7 September the employer warned Mr Sangster that “disciplinary action” could result if the company remained dissatisfied with his explanations about his hours of work or any of the other expressed concerns.

[40] Although Mr Sangster had raised a grievance about the hours of work issue on 13 September the disciplinary investigation was continued. Ms Swarbrick's letter of 9 December 2004 includes reference to Hours of Work as a particular allegation against Mr Sangster that the employer intended to make a decision about in concluding its disciplinary investigation. Mr Sangster responded four days later to the contents of that letter by resigning.

Unjustified disadvantage grievance

[41] I find that TGL acted unfairly and unreasonably, and therefore unjustifiably, in relation to the problem over Mr Sangster's hours of work at Kerepehi. It was an unjustified action to threaten Mr Sangster with disciplinary action over a term of employment that had not been directly and expressly negotiated and the contents of which had remained uncertain between the parties. Mr Sangster was disadvantaged in his employment by this action, as he lost security in his job while there was a risk of disciplinary action being taken against him. I find he has a personal grievance in respect of this disadvantageous action taken unjustifiably by TGL.

The other performance concerns

[42] Notes were made of the meeting of 20 August between Mr Tanner and Mr Sangster. I accept that they are an accurate record. The notes and the evidence given about the meeting show that specific matters to do with Mr Sangster's work performance were raised as part of a broader concern Mr Tanner had about the level of communication between the pair. Although Mr Sangster was surprised and disconcerted by having these concerns raised, they seem reasonably to be matters

that a chief executive officer of a company, especially a financially troubled one, would wish to take up with a chief financial officer. There was nothing unfair about this meeting, the purpose of which seems to have been to remind Mr Sangster of his duties and responsibilities.

[43] The meeting of 20 August closed with a request for Mr Sangster to consider what had been discussed and to meet if necessary for further discussion. He responded to Mr Tanner in writing on 7 September. Generally Mr Sangster rejected the concerns as having any validity. He claimed he was being treated unfairly in view of his service record and that he was being treated in a way that was causing him stress. He said that he was seeking legal advice.

[44] The response of TGL the same day was to request Mr Sangster's attendance at a formal disciplinary meeting to discuss the concerns that had been raised on 20 August. These were specified as disclosure of confidential information, entry into contractual arrangements without supplying information and obtaining prior authority, late financial reporting and hours of work. Mr Sangster was warned that disciplinary action might follow from the requested meeting and he was invited to have a representative at it.

[45] On 13 September through his solicitors Mr Sangster raised his first grievance. He complained that he had been unjustifiably disadvantaged by the relocation of TGL's Head Office and by the employers attempt to raise its concerns as part of a formal disciplinary process. Why the commencement of that process was claimed to be unjustified, was not stated. Mr Sangster with his representative participated in the disciplinary process by attending a meeting held at Kerepehi on 15 September 2004. All of the concerns were discussed, together with an additional one about divulging his computer password to another employee.

[46] Mr Sangster commenced sick leave from 15 September 2004 and he did not return to work again before he resigned on 13 December 2004.

[47] On 29 September TGL wrote again to Mr Sangster requesting a further meeting to discuss new concerns about his performance as financial controller. These were specified in some detail and TGL advised that the concerns had originated from the report on the company's financial performance which had been produced by chartered accountants Ferrier Hodgson on 1 September. The report had been prepared for the purposes of an application intended to be made to a bank by TGL for a loan.

[48] The Ferrier Hodgson report is a document containing information and advice about TGL and its business performance. The report was prepared independently of TGL by a professional agency which had no interest in the employment relationship between TGL and Mr Sangster or in disciplinary matters arising out of that relationship.

[49] I do not accept that TGL used the Ferrier Hodgson report or the supplementary report from that firm written on 20 September, as a convenient excuse to broaden the scope of the disciplinary process already commenced and do so with a view to forcing Mr Sangster to resign under the pressure. The reports read together speak for themselves and TGL's response to them seems fully understandable and justifiable given the precarious financial state of TGL and the serious criticisms made by Ferrier Hodgson about the handling of financial matters that plainly fell under the responsibility of Mr Sangster. I do not accept that TGL used the reports with any ulterior motive as contended.

[50] I expect that any bank before advancing a loan of commercial proportions might be concerned to know what investigation the borrower business had carried out into such matters of criticism as are to be found in the Ferrier Hodgson reports. A bank might also want to know what steps were

being taken to address such matters. It was not a realistic option for TGL to take no action on the reports simply because there had been a first round in a disciplinary process.

[51] Given the timing of the production of the two Ferrier Hodgson reports I do not consider that TGL held back in bringing them up with Mr Sangster, simply to maintain and increase pressure on him in the hope that he might resign. TGL responded sensitively to the fact that Mr Sangster was on sick leave and delayed holding a further meeting to consider the new concerns. Mediation was also attended by the parties in the interim.

[52] On 19 November in correspondence Mr Sangster said that he was prepared to meet with TGL as had been requested and that he would be seeking clarification of the performance allegations, particularly those arising out of the Ferrier Hodgson reports. There was further correspondence providing clarification and Ms Swarbrick, on 9 December, provided Mr Sangster with a comprehensive summary of all outstanding matters as previously notified and that remained to be resolved as the subject of the disciplinary investigation. This was entirely appropriate, given the largely unavoidable delay that had occurred in bringing the investigation to an end and also given the reasonable need to expand the scope of the investigation.

[53] It seems that the contents of Ms Swarbrick's letter prompted Mr Sangster to resign. I do not find however in the circumstances that Mr Sangster's resignation was caused by any breach of duty. It seems more likely to me that the resignation was a response by Mr Sangster to a fear that some of the performance allegations would be proven against him. That fear may have been unfounded but he did not wait to see. The employer acted fairly and reasonably with regard to its handling of the above performance concerns. As to the hours of work issue with his performance, I do not consider that Mr Sangster regarded this as an issue that he was going to be disciplined over. He had after all been offered alternatives to the long days of working from Kerepehi and he had no reason to think that if this was the only concern TGL had about his performance it would not have been resolved by further discussion and agreement. The claim of constructive dismissal is therefore rejected by the Authority.

Determination

[54] I determine that TGL has responsibility only for a disadvantage grievance arising from the unjustified pursuit of disciplinary action against Mr Sangster. This was solely in relation to his hours of work at Kerepehi.

Remedies

[55] The disadvantage to Mr Sangster was a feeling of increased insecurity in his employment as a result of having the hours of work issue added to several other concerns that were properly the subject of the disciplinary process. His feelings were hurt because he had regarded himself as a loyal employee who for six years had been regularly working beyond the contractual hours. The disciplinary action over hours of work was also pursued up to the resignation in December, when it could have been dropped much earlier after the first round in September. Compensation cannot be awarded on the basis of the stress caused by the additional hours, as this was something Mr Sangster voluntarily undertook outside of his employment and it was also something he had not raised with TGL before 20 August. It also seems from his request to be paid more that he thought his stress could have been alleviated by financial compensation rather than reducing his hours of driving.

[56] I do not accept in the circumstances that TGL became responsible for the fact that Mr Sangster had to use annual holidays when he ran out of paid sick leave. Mr Sangster acquiesced in

the circumstances that he claims were partly the cause of his stress, and an employer has a very limited ability to interfere in the arrangements employees may wish to make about where they reside and how and when they travel to work. If TGL had some responsibility in this regard then so to did Mr Sangster have a duty to tell his employer about any unreasonable stress or fatigue that he attributed to his employment. He raised nothing about this before 20 August. Then, it was mentioned only as a response to concerns raised first by TGL.

[57] The disadvantage grievance and resolution of that does not hook back to the original redundancy situation that could have applied to Mr Sangster in relation to the relocation of Head Office, had he not followed TGL to Kerepehi. Neither does it hook forward to the redundancy situation that seems to have consequently arisen from the recent closure of operations by TGL.

[58] Mr Sangster did not contribute to the situation that gave rise to his grievance. His conduct in relation to the hours of work issue was not a matter of blame and should have been dealt with quite differently. His criticised work performance as Group Financial Controller did not contribute with regard to this particular grievance, either.

[59] I award \$3,500 to Mr Sangster to remedy his disadvantage grievance. TGL is ordered to pay that sum under s.123(c)(i) of the Employment Relations Act.

Non-publication order

[60] The contents of the Ferrier Hodgson reports of 1 and 20 September 2004 are now subject to a non-publication order made by the Authority under clause 10 of Schedule 2 of the Employment Relations Act 2000.

Costs

[61] Costs are reserved on the usual basis in the Authority that the parties will attempt to resolve the question themselves before making application.