New Zealand Employment Relations Authority Decisions

Smith v Pacific Optics Limited (Christchurch) [2010] NZERA 947 (17 December 2010)

Last Updated: 11 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 234/10 5290028

BETWEEN

A N D

GEOFF SMITH Applicant

PACIFIC OPTICS LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Philip Cheyne

David Beck, Counsel for Applicant
Francis Reade, Representative for Respondent
12 December 2010 at Christchurch
17 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Geoff Smith worked for Pacific Optics Limited (POL) as a sales executive from October 2008 until his employment was terminated by correspondence in November 2009. That followed a number of warnings about poor performance. Mr Smith says that he has a personal grievance of unjustifiable disadvantage regarding the warnings and unjustifiable dismissal regarding the termination of his employment. There are claims for compensation for lost remuneration and compensation for distress. There is also a claim for a penalty for breach of good faith arising from how POL issued the warnings and effected the dismissal.

[2] POL says that its actions in warning and then dismissing Mr Smith were completely justified.

[3] Despite mediation the parties were not able to resolve these problems.

[4] To resolve the problems I will explain the sequence of events and apply the legal test for justification but will first say a little more about the employment.

Employment agreement

[5] There is a written individual employment agreement which both sides say was applicable even though it was not signed.

[6] Clause 1 of the agreement provides for permanent employment subject to a three month trial period during which the employer was to regularly consult with Mr Smith and review his work, issue warnings in the event of performance below expectations and either extend the trial period by a month, confirm the employment or dismiss Mr Smith on notice. There is

no evidence that POL actually did any of these things in the first three months of Mr Smith's employment. The only evidence about Mr Smith's performance during the early part of his employment is that he received *Sales Executive of the Month* awards in recognition of his work.

[7] Clause 19.1 of the agreement says *The Employer may only terminate this agreement after following the procedures prescribed by law and, on termination, give the Employee no less than one month, notice in writing. ...*

[8] Clause 25 reads as follows:

Formal Procedures and Investigations

25.1 There are 2 stages in the formal disciplinary procedure that will generally be imposed before dismissal (except for serious misconduct):

1. *Written warning*
2. *Final written warning*
3. *Dismissal*

25.2 Before entering into a formal process, the Employee will be advised of the Employer's concerns and be given a reasonable opportunity to improve. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures.

Prior to any formal meeting, the Employee will be advised of the specific allegation and of the likely consequences should the allegation be found to be true. The Employee will also be advised that they are entitled to have a support person at the formal disciplinary meeting. During the meeting the Employee will be given an opportunity to explain or deny the allegation. The Employee's explanation and any mitigating circumstances will be considered before a decision is made on the appropriate course of action.

If the Employer decides to issue a warning, this will be formally and clearly issued in writing. The Employee will be advised of any corrective action that is required, and the consequence of continued or further instances of misconduct or performance below expectation.

25.3 All warnings will remain effective for a period of 12 months. If the Employer is required to impose a further disciplinary sanction within the effective period, the next stage of sanction will be imposed .Warnings that give rise to a termination do not have to be for the same or similar reason.

Dissatisfaction with Mr Smith's performance

[9] Mr Smith's sales territory included part of Christchurch, Canterbury and the West Coast. His job included regularly visiting POL's clients to merchandise POL's display unit on the client's site allowing the client to sell POL products such as hats and sunglasses. He reported to POL's Auckland based Business Development Manager (Shane Wilson).

[10] Francis Reade is POL's Aerial Brand Manager based in Auckland and he commenced in that position in November 2008 shortly after Mr Smith started work. Mr Wilson reported to Mr Reade.

[11] On 3 June 2009 Mr Reade wrote to Mr Smith setting out *matters of concern.* To summarise, the concerns were: overstocking; (not) listening to customers; (not) maintaining regular visits; loss of accounts due to lack of diligence and personality clashes; more than 20 customers in May not having received a visit; (not) following head office directives; and (not) completing monthly stocktakes. The letter refers to calls from customers with complaints about Mr Smith's service. It ends by saying *These areas need immediate attention and we look forward to improvement. Failure to adhere to this will leave us with no option but to take more drastic action. If you need any help or support from us do not hesitate to ask as we are more than willing to help.*

[12] Mr Smith responded in writing on 9 June 2009. To summarise, the response was: he did not overstock but the previous incumbent had to Mr Smith's detriment; to advise him of any lost accounts for which he thought there would be a valid reason; to advise him of which clients were not visited in May since he had caught up as much as possible following two days leave; asking for training on stocktake systems; and generally inviting Mr Reade or the Business Development Manager to spend time on the road with him so as to understand the challenges of the role.

[13] Mr Reade responded in writing on 24 June 2009. He gave six examples to back up his concerns expressed in the earlier letter, questioned whether Mr Smith had caught up with missed calls, clarified that stocktakes had to be done monthly and discounted the relevance of any fault on the part of the previous incumbent in light of the passage of time. The letter stated

that *The sales results in your area is considerably below the rest of the South Island and this is being monitored closely.*

[14] Overlapping this correspondence Mr Smith also received and completed a staff performance appraisal form. It also recorded Mr Reade's dissatisfaction with aspects of Mr Smith's performance such as poor customer feedback and complaints, missed calls and sales below budget. There were some acceptable aspects of Mr Smith's performance.

[15] On 30 July 2009 Mr Reade wrote again to Mr Smith. This followed reports from visits to some of his sites. The letter criticised Mr Smith's adherence to POL's *plannogram,* dirty display stands, the complete lack of or low stock numbers of certain products, watches on display that had stopped and inappropriate stock selections. It said that these matters would have contributed to Mr Smith's region being the worst performing sales region at 65% of budget. It ended with:

Please be advised that this is a further warning. We expect all issues highlighted above and previously together with all aspects of your employment contract and key performance indicators to be rectified and adhered to. We will continue to monitor your performance very closely with a further review by 4 September 2009.

We regret to advise that your continued association with this company is in jeopardy and failure to address all of the issues identified above may lead to termination of employment.

[16] Following a visit by Mr Wilson, Mr Reade wrote again to Mr Smith on 23 September 2009. He referred to the previous correspondence, a lack of any improvement and six specific issues, similar to or the same as those mentioned earlier. That letter ended with:

Please treat this advice as your final warning and any evidence as to non-adherence to any of the issues raised above or in previous correspondence (copies attached), will leave us with no option but to dismiss you from your employ with Pacific Optics Limited.

Unjustified disadvantage

[17] Mr Reade's evidence is that the letter dated 3 June 2009 was a first warning that with the two other letters expressed to be warnings were all properly issued to Mr Smith for good reason and in compliance with the provisions in the employment agreement set out above.

[18] The letter dated 3 June 2009 is not expressly a formal warning in accordance with clause 25 of the agreement. I find it to be more in the nature of a caution to Mr Smith about various areas of dissatisfaction for him either to explain or remedy. Mr Reade made it clear by his letter of 24 June 2009 that he remained dissatisfied despite Mr Smith's explanation in writing. These exchanges are no more than context for present purposes. It is not necessary to assess legal justification.

[19] The two letters expressed to be warnings (30 July 2009 and 23 September 2009) were obviously intended as formal disciplinary actions by POL. Justification for these actions must be assessed objectively by considering whether the actions and how POL acted were what a fair and reasonable employer would have done in the circumstances at the time. Such an employer would comply with the applicable employment agreement but POL did not. POL did not advise Mr Smith of the *specific allegations and of the likely consequences.* POL did not advise Mr Smith of his entitlement *to have a support person at the formal disciplinary meeting.* POL did not give Mr Smith *an opportunity to explain or deny the allegation.* POL did not consider Mr Smith's *explanation and any mitigating circumstances* before making its decision. POL did not convene any type of meeting for these purposes. Mr Reade simply decided to issue Mr Smith the warnings for the reasons set out in each letter and advised Mr Smith in writing of these decisions.

[20] The warnings made Mr Smith's employment less secure so he was disadvantaged in his employment. He therefore has a personal grievance.

[21] I will return to the question of remedy and contribution later. However I should note that Mr Smith raised a grievance about the termination of his employment by his solicitor's letter dated 24 November 2009 which also said *we will be pursuing a separate claim for breach of contract given our client has been previously the subject of warnings that were not accompanied by any semblance of procedural fairness or formal meetings in accordance with clause 25 of his individual employment agreement.* Mr Smith's statement of problem included unjustified disadvantage grievance claims, a breach of contract claim and a breach of good faith claim with respect to these warnings. It would have been open for POL to defend the unjustified disadvantage grievances at least about the first warning (30 July 2009) on the basis of it being raised out of time. However that objection was never raised and POL must be taken as impliedly consenting to an otherwise out of time grievance.

Dismissal

[22] On 22 October 2009 Mr Reade wrote again to Mr Smith requiring him to attend a phone conference on 28 October 2009 to discuss allegations of continuing underperformance. The letter lists 6 allegations: lack of attention to plannogram; customer complaints; disgruntled clients resulting in lost business; failure to follow head office instructions; poor stock selection and understanding of market contributing to low sales; and worst performing sales area in New Zealand. Mr Smith was advised of the right to a support person or a representative and cautioned that his employment might be in jeopardy. The letter was

emailed to Mr Smith and he apparently first saw it on 27 October 2009. He replied by email declining the opportunity to participate in a phone call but said he would reply in writing. When nothing was received Mr Reade reminded Mr Smith on 30 October and he sent a reply to the six points the same day.

[23] To summarise Mr Smith's response: he always set the plannogram according to instructions and was not responsible for any disorder caused between site visits; the numerous complaints were about POL not him personally; the two disgruntled clients were not the result of any fault on his part; since being shown how he had been doing stocktakes accurately and on time; the stock selection issues were the fault of the warehouse (possibly by reason of sabotage) not him; and sales results reflected the recession despite his hard work.

[24] Mr Reade sent Mr Smith a letter dated 10 November 2009 advising of the decision to dismiss with 4 weeks wages in lieu of notice. It referred to written warnings dated 3 June 2009, 30 July 2009, 23 September 2009 and gave the reasons as: numerous complaints resulting in two lost accounts and decreased sales on other accounts; sales substantially below budget; not calling on all customers monthly resulting in lost sales; misleading information being merchandising calls to clients who had closed or ceased business with POL; inability to manage the area effectively to POL's standards; with the result that the area was the worst performing region.

[25] Mr Smith raised a grievance by his solicitor's letter dated 24 November 2009. The principal grounds mentioned are: lack of detail in the 22 October 2009 letter; a failure to properly investigate the wider context and interview significant clients; little or no consideration being given to Mr Smith's explanation letter; a failure to consider Mr Smith's otherwise good work record; and a failure to meet face to face to discuss the disciplinary matters.

Justification for dismissal

[26] Justification must be assessed objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in the circumstances.

[27] There are two aspects of Mr Smith's grievance claim that I do not accept. Mr Smith says that he was targeted by POL because he refused to agree to a proposal in May 2009 to change his remuneration to a lower base salary but a higher commission rate. I do not accept that there was a *dirty ticks campaign* thereafter to undermine Mr Smith's selling ability. That would mean that POL deliberately forewent sales and placed at risk their future customer relationships in very difficult trading conditions in order to get rid of a sales executive. Such behaviour is unlikely and there is no evidence to support the contention. The second point is Mr Smith's claim that a letter dated 13 August 2009 was somehow threatening in a way relevant to his personal grievance. The evidence is that Mr Smith was not the only sales executive to receive the letter which referred to difficult trading conditions, head office restructuring, a need to lift service and sales and the possibility of a major restructuring unless there was an improvement. The August letter does not bear in any material way on Mr Smith's grievance claims.

[28] There is immediately a problem with justification for the dismissal because no fair and reasonable employer would have regarded the 3 June 2009 correspondence as a warning and the two subsequent letters expressed to be warnings fall short of being valid warnings for the reasons explained above. POL is left in the position of having dismissed Mr Smith for work performance reasons without having properly warned him; in other words dismissing him in breach of the applicable employment agreement which is something no fair and reasonable employer would do.

[29] There is a further problem as well. What happened here was that Mr Reade simply complied with the form of the contractual disciplinary process without complying with the requirement of substantive fairness. I do not accept the submission that there needed to be a face to face meeting to discuss POL's concerns -they were clearly enough set out in the 22 October 2009 letter and it was Mr Smith who declined the opportunity to discuss matters by way of phone conference. The difficulty is that Mr Reade was simply going through the motions by the time of the 22 October 2009 letter because he had formed the view that Mr Smith's performance was inadequate but there needed to be at least the appearance of a proper process.

[30] Mr Reade was also somewhat selective in the complaints raised with Mr Smith. For example, he apparently had received second hand a complaint that female staff at one of Mr Smith's sites felt *threatened* by Mr Smith's manner. POL addressed that complaint by allocating the site to the other Christchurch based sales executive and telling Mr Smith that this was because the other sales executive lived nearby and purchased fuel from that site. Mr Smith was not given an opportunity to explain or respond to the allegation, nor was he told the real reason for this change. Those are not the actions of a fair and reasonable employer.

[31] It follows that Mr Smith was unjustifiably dismissed and has a personal grievance against POL.

Remedies

[32] Pursuant to s.124 of the Employment Relations Act 2000 it is necessary to assess the extent to which Mr Smith contributed in a blameworthy manner to the circumstances giving rise to his grievances.

[33] I am satisfied that there is substantial merit in POL's criticisms about the standard of Mr Smith's work. Steven McElwain, the other Christchurch sales executive, gave evidence about his observations which I accept. He saw and reported the poor state of stands at several of Mr Smith's Christchurch sites. This appears to have been in June 2009 or earlier. Later Mr McElwain observed the poor state of Mr Smith's Hanmer sites. I accept his evidence that Caltex Fairlie, Mobil Rakaia and Hinds On The Spot all expressed dissatisfaction with Mr Smith's service. Mr McElwain showed Mr Smith how to properly set up a stand and do his ordering one time in Ashburton and heard complaints about Mr Smith's service at several other Ashburton sites. I accept Mr Reade's evidence that Mr Smith's was the worst performing region against budget. I also accept his evidence, albeit hearsay, that Mr Wilson assisted Mr Smith with training and procedures at different times during Mr Smith's employment. Mr Reade's evidence leads me to conclude that the various concerns put to Mr Smith in all of the correspondence were genuinely held by POL and I find they arose substantially because of Mr Smith's poor work performance. To sum up, Mr Smith was to blame for the substance of the dismissal but POL was responsible for not properly dealing with its concerns in accordance with clause 25 of the employment agreement.

[34] In *Air NZ v Hudson* [2006] ERNZ 425 the Employment Court referred to Court of Appeal decisions mandating a loss of a chance approach to assessing compensation in cases of unjustified dismissal for purely procedural reasons and said that such an approach was consistent with the considerations which apply under s.124 of the Act. Compensation must reflect whether it would be likely that an employee would have been dismissed if proper procedures had been followed. In the present case, in all probability, Mr Smith would have been justifiably dismissed if POL had complied with the contractual requirements about warnings. That rules out any compensation for lost remuneration but permits an award of compensation for distress associated with the poorly conducted warnings in particular.

[35] The evidence is that Mr Smith was surprised and disappointed about the approach taken by Mr Reade to simply send him letters without first giving him an opportunity to explain or mitigate. He expressed those emotions in his response to the 3 June 2009 letter but did not respond to the subsequent warning letters because he had formed the view that Mr Reade was not prepared to listen to him. I find that his disappointment deepened when he similarly received the two warning letters. He continues to have a sense of grievance about POL's approach. I assess the appropriate sum to remedy Mr Smith for this distress is $2,500.00.

[36] The extent to which Mr Smith contributed to these grievances has been fully recognised in the decision not to award any compensation for the loss of his employment or for lost remuneration.

[37] These matters having been addressed as personal grievances, it is not necessary to consider the alleged breach of employment agreement claims.

Penalty for breach of good faith

[38] There is a claim for a penalty for breach of good faith. I am referred to s.4(1A)(b) which provides that good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. It is said that POL breached this obligation by issuing warnings to Mr Smith without engaging in any formal disciplinary meetings; and that this failure was deliberate, serious and sustained or intended to undermine the employment relationship: see s.4A(a) and s.4A(b)(iii).

[39] I accept that the established grievances mean that POL must be regarded as having breached good faith.

[40] There is no evidence to establish that POL breached good faith with an intention to undermine its employment relationship with Mr Smith. Accordingly the claim based on s.4A(b)(iii) must fail.

[41] I do not accept that the breaches were *deliberate, serious, and sustained.* As has been made clear this matter is about an employer who failed to follow a contractually agreed process when dealing with genuine concerns about poor work performance. If this case meets the threshold for a penalty for breach of good faith then most if not all personal grievances would also come within the penalty provision. That is not the intention of parliament as reflected in the section heading.

Summary

[42] Pacific Optics Limited is to pay Mr Smith the sum of $2,500.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[43] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority