

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Stephenson (Applicant)

AND Sealegs International Limited (Respondent)

REPRESENTATIVES Clive Bennett, Advocate for Applicant
Emma Butcher, Counsel for Respondent

MEMBER OF AUTHORITY Ken Raureti

INVESTIGATION MEETING 24 August 2006

DATE OF DETERMINATION 13 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem.

[1] John Stephenson was employed by Sealegs International Limited as a CAD Draughtsman. His employment commenced on 19 September 2005. On 11 October 2005, three weeks and two days later he was dismissed. The reasons for the dismissal are outlined in a letter which indicated that his technical skills were not adequate to meet the demands of the work, the speed in which he completed the work was below Sealegs expectations, and Sealegs were not comfortable in the way in which he solved problems. Mr Stephenson says his dismissal is unjustifiable. He is seeking reimbursement of lost earnings and compensation for humiliation, hurt feelings and injury to his feelings.

[2] Sealegs International Limited denies that Mr Stephenson was unjustifiable dismissed. The company asserts that Mr Stephenson was given adequate warning prior to the dismissal, and the dismissal was carried out in a procedurally fair manner.

Background.

[3] Around September 2005, Sealegs created a new role, a CAD Draughtsman position. The job involved using technical computer design software (Solidworks) to draw up plans for marine craft designs. Prior to this the company had outsourced its design work to contractors who used Solidworks.

[4] Mr Stephenson was interviewed for the job by the Company Founder, Mr Maurice Bryham, and the Managing Director, Mr David McKee-Wright. During the interview, Mr Stephenson told them that he had experience in Solidworks, he had a Solidworks Certificate of Competence, but he didn't have an in-depth detailed knowledge of the software, and he would require some targeted tutoring and initial additional assistance. As part of the interview process, Mr Stephenson was required to do two pre-employment drawing tests using the Solidworks software. There was no fixed time for the test to be completed in, as in "x" number of minutes or hours, but he was given a week to complete the tasks. When Sealegs received the test back, it noted some errors in relation to scaling and alignment, but apart from those errors, Sealegs were reasonably comfortable and concluded that Mr Stephenson was able to use Solidworks to an adequate standard, although, unbeknown to it at that time, Mr Stephenson completed the test with the assistance of the support desk at Intercad, the company that

provides help desk support for Solidworks. The pre-employment test was not a test to try and trap Mr Stephenson, it was a test to try and gauge/assess Mr Stephenson's familiarity with the software. Mr Bryham indicated that if the test was graded, Mr Stephenson would have passed with about 90%.

[5] On the basis of Mr Stephenson's application, and the test results, Mr Bryham rang him to offer him the job. In that phone call he discussed the errors that he had made in the test, and then arranged for written confirmation of the offer. On the 7th of September, Sealegs emailed an attachment to Mr Stephenson being a Letter of Offer and the General Terms and Conditions of Employment. A couple of hours after receiving the email of offer of employment, he replied in the affirmative, thanked them for the offer and said he was pleased to accept it.

[6] Mr Stephenson commenced work with Sealegs on the 19th September which is when he confirmed his acceptance of the job by signing the offer of employment. On the first day, he was given a relatively simple project to design a pattern for mats to go on an existing rectangular hatch which needed to be 20mm smaller all round. Mr Bryham indicated that the pattern Mr Stephenson drew up did not even look like the same shape. Mr Bryham said that he started to lose confidence in him from that point on, as that was a very simple task.

[7] Later in the week, (about Wednesday) Mr Bryham gave him a second project, the Scupper Drain project to complete by Friday. Mr Bryham says that during the course of the first week, he monitored Mr Stephenson's progress and noticed he was struggling. He said he attempted to assist him to put the model together, but despite that assistance, the project was not completed by the end of the week. Mr Bryham said that he was concerned that Mr Stephenson was unable to complete those two relatively straightforward jobs. He decided to extend the deadline for the Scupper Drain project to the following Tuesday, 27 September 2005. He says it was critical that the project was completed by Tuesday, as there were four boats that were waiting to be manufactured which relied on those plans, and on top of that, Mr Bryham was leaving the country on the 28th for almost two weeks.

[8] Mr Bryham said that the next week, he continued to assist Mr Stephenson with the project, but by the afternoon of the 27th, the project still did not look close to completion. Mr Bryham said he continued to work with him until about 7.00pm that evening when he decided to abandon the project out of frustration.

[9] Mr Bryham said that by working with him, he realised that Mr Stephenson would need very clear instructions if he was going to achieve anything constructive while he was away, so he met with Mr Stephenson and the Workshop Manager to discuss the Hull Assembly project which he was to work on during Mr Bryham's absence. After that meeting, Mr Bryham emailed a detailed description of the project to Mr Stephenson, including a completion date for the project of 10 October and copied it to the workshop Manager.

[10] After going home that evening, Mr Bryham reflected on the situation, and concluded that it was clear to him that Mr Stephenson had struggled with two relatively straightforward projects, and he formed the view that they should cut the losses then and there and call it quits. At about 8.30pm that evening, he phoned Mr Stephenson and told him he had grave concerns about his technical abilities, he didn't think it was working out, and perhaps they should call it quits. Mr Bryham said he made it very clear to him that on what he had seen to that point; he didn't think it was worth carrying the employment relationship on.

[11] He said Mr Stephenson acknowledged that he had been having some difficulties, but he assured him that he could do the job and he persuaded Mr Bryham to give him another chance. Mr Bryham accepted the assurances and decided that if he completed the Hull Assembly project by the time he returned from overseas, his employment with Sealegs would be continued.

[12] On Monday the 10th October, when Mr Bryham returned from overseas, he had not completed the project. In Mr Bryham's assessment, the job was only about 50-70% complete.

Mr Bryham said that this was annoying and frustrating but again he worked with Mr Stephenson for a full day and a half to help him complete the job, however by midday on the Tuesday, it was apparent that he was not going to be able to complete the project to a satisfactory standard. By this stage, Mr Bryham had formed the very clear impression that Mr Stephenson was simply not capable of performing the role of CAD Draughtsman.

[13] Mr Bryham chose to seek the opinions of two independent clients that deal with Sealegs on a regular ongoing basis. He spoke to a Mark Duggan of the support desk at Intercad. Mark told Mr Bryham that Mr Stephenson had been making multiple calls to the support desk, and was asking questions that were below the standard they would expect from someone that had more than a basic level of experience using Solidworks.

[14] Mr Bryham also spoke to a person from Metal Designs Limited, the company that cuts the parts for the boats according to the designs Sealegs provides them. He was told that Mr Stephenson had sent them a design file for part of the hull which had massive errors, and if that design had been relied on to cut the parts for the boats; it would have cost Sealegs thousands of dollars.

Dismissal meeting.

[15] That afternoon, after having obtained the information from Intercad and Metal Designs, Mr Bryham met with his Managing Director and they discussed the concerns that he had. During this meeting, Mr Bryham and Mr McKee-Wright decided that Sealegs could not continue to employ Mr Stephenson. They called him into Mr McKee-Wright's office and informed him that his employment could not be continued, and that he would not be required to work out the notice period. Later, on the 13th October, Sealegs confirmed its reasons (3) for the termination in writing. The reasons were:

Technical Skill.

Independent feedback suggested your technical skill was not adequate to suit the demands of the work at Sealegs.

Speed of work.

Whilst you had a conscientious work attitude, the speed in which your work was completed was below our expectations. Sealegs had previously employed the use of two draftsmen, both of whom set speed expectations you did not meet.

Problem solving logic.

Sealegs was not comfortable with the way you solved problems which created an inherent lack of confidence in your work. This would have resulted in having to double check your drawings which would cost time and money.

[16] It was made clear in that letter that Sealegs had no problem whatsoever with Mr Stephenson's professionalism or work ethic and would be happy to act as a reference for either of those attributes.

Trial/Probationary Period.

[17] Mr Stephenson says he was not aware that his employment was subject to a probationary period. He maintained that he would not have left a very secure position that he had if he knew that his employment was subject to a probationary period. The full terms and conditions of employment were contained in the written letter of offer, and the Sealegs International Limited General Terms and Conditions of Employment (7 September email). At clause 2 (b) of the agreement is a probationary period which ***the parties agree that the Employee will serve a probation period of three (3) months from the beginning of the employment, and the employer will provide guidance and feedback to the Employee during this probationary period. During this period either party may terminate employment, provided two weeks notice is given.*** At clause 3 it says ***The Employer agrees to act as a good employer in its dealings with the Employee and to enter this agreement based on good faith.***

[18] I am satisfied that Mr Stephenson received the 7 September email that had an attachment which included the letter of offer, and the General Terms and Conditions of Employment. Mr Stephenson indicated acceptance of the offer of employment by way of replying to the email in the affirmative, and on the 19th of September, he further evidenced his agreement by signing Sealegs' signatory page which is headed *ACCEPTANCE*, and states, *I accept the offer of employment by Sealegs International Limited on the terms outlined above and on the attached general terms and conditions.* **On the evidence, I conclude that Mr Stephenson's employment was covered by a probationary period**

[19] The law surrounding termination of employment during or at the end of a trial period is set out by the Court of Appeal in **Nelson Air Limited v New Zealand Air Line Pilots Association (Inc)** [1994] 2 ERNZ 665. In this case, the Court recognised it was accepted that there were less stringent procedural requirements in the case of an employee on a trial period, but this does not release an employer from its obligation to act fairly. At 669, the following refers:

"Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end." (p 669).

Analysis and Findings.

[20] Mr Stephenson's employment was subject to a probationary period. From the first project, (rectangular floor mats) Mr Bryham noticed that Mr Stephenson was struggling and he started to lose confidence in him. Mr Bryham attempted to assist him in that first week, and continued to work with, and assist him in two days of the second week. By the end of that second day of the 2nd week, Mr Bryham decided to ring Mr Stephenson at his home at 8.30pm in the evening. During that call Mr Bryham frankly expressed his concerns and suggested that they should cut the losses and call it quits. Mr Stephenson managed to persuade him to give him another chance, that chance was that he had to complete the Hull Assembly project by the 10th of October which is when Mr Bryham returned from overseas.

[21] Upon his return, the project wasn't completed, which was annoying and frustrating for Mr Bryham. Mr Bryham worked with Mr Stephenson on the 10th, and for about half a day on the 11th in an effort to try and assist him to complete the project; however by midday he had formed the very clear impression that he was simply not capable to fulfil the role. After talking to some external people; and discussing the matter with Mr McKee-Wright, Mr Stephenson was called into the office and was told that his employment could not be continued, he would be paid the required amount of notice, and he would not be required to work the notice out.

[22] Sealegs asserts that Mr Stephenson was given adequate warning (the ongoing assistance provided by Mr Bryham, and the formal notification during the 8.30pm phone call). Sealegs also says he was also given an opportunity to improve his performance (complete the Hull Assembly project). I do not agree with that assertion. Such a telephone call at the hour it was made, after Mr Bryham having abandoned the project in frustration, indicating his clear intention not to continue with the employment relationship and call it quits, and then being persuaded to give Mr Stephenson one more chance, does not in my view characterise a fair warning.

[23] The company says that the dismissal meeting was carried out in a procedurally fair manner bearing in mind the lower threshold that applied because of the probationary period. It goes on to say that though Mr Stephenson was not told what the nature of the meeting would be about, that it was serious, or that he could attend with a support person does not mean

Sealegs acted in a procedurally unfair manner, as the Sealegs facts are analogous to the *CRC Industries New Zealand Limited v Person* case.

[24] While there are some similarities, there are also some stark differences. In the *CRC* case, the worker was given a formal and final warning that if her work and attitude did not improve her employment may be terminated. There were other lengthy discussions with the worker about her work and attitude, and a week later a further verbal warning was given to her for a separate matter. In this matter, there is no reflection or evidence of such a process of lengthy discussions, identifying shortfalls, or particularising how performance could be improved.

[25] Sealegs was not just a critical observer, but it did not articulate, or clearly point out the shortcomings, nor advise about what improvements were necessary. It is accepted that Mr Bryham provided guidance, feedback and assistance to Mr Stephenson, however, the assistance he was able to provide was at a higher, more strategic level, which is not the level of assistance necessary to successfully progress and complete the projects. I accept Mr Stephenson's evidence that he told Sealegs before he started that he may need some targeted initial added assistance in respect of Solidworks of between 4 – 6 hours.

[26] Given the very embryonic stages of the employment, Sealegs' prior knowledge of Mr Stephenson's indication that he would need initial targeted assistance, and the position being a new position for Sealegs, Sealegs was obliged and bound by its own terms and conditions of employment, and the legal principles outlined above to provide guidance and feedback.

[28] Sealegs makes further reference to the *CRC Industries* decision when it accepted that Mr Stephenson was not given an opportunity at the dismissal meeting to fully respond to the information Mr Bryham had obtained from Intercad and Metal Designs. Once again, while I accept there are some similarities, the facts and whole matrix of this matter are distinctly different.

Determination.

[29] Mr Stephenson was entitled to fair and reasonable treatment, he was entitled to know what the shortcomings were, how those shortcomings could be overcome, and an opportunity to rectify them. He was also entitled to an opportunity to respond fully to all of the concerns Sealegs had about his employment. He was not given such opportunities. Standing back and objectively considering the matters, I conclude Sealegs' decision to dismiss Mr Stephenson was not what a fair and reasonable employer would have done.

[30] Mr Stephenson was unjustifiably dismissed; he has a personal grievance and is entitled to remedies in settlement of that personal grievance.

Remedies.

[31] Having concluded that Mr Stephenson was unjustifiably dismissed, it follows that consideration must be given to the remedies available to him under sections 123, and 128 of the Employment Relations Act 2000. I am bound by s.124 of the Act to consider the extent to which Mr Stephenson's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies accordingly.

[32] In my view, Mr Stephenson could have been more forthcoming and open with Sealegs when he returned the pre-employment test by letting them know the difficulties he had with the test, and that he had completed the tests with the assistance of the Intercad support desk. Without that external assistance, a 90% assessment result was unlikely. However, I balance that with my earlier finding that Mr Stephenson alerted the company to his lack of detailed knowledge of Solidworks, and his indications that initially he would require some targeted support. I find that in the circumstances, there is no blameworthy conduct on his part which could constitute contributory fault requiring a reduction to the remedies.

[33] Mr Stephenson indicated he has been unable to find another job since he was dismissed in October 2005. He has drawn my attention to the discretion provided for in s.128 (3) of the Act and seeks a greater payment of more than the 3 months' ordinary time maximum of s.128 (2). Mr Stephenson says that in the circumstances, an award equivalent to six months salary would not be unreasonable.

[34] Mr Stephenson gave evidence that he had heard how difficult Mr Bryham was to work for, and he likened working for Mr Bryham to being a boxer in a boxing ring with both hands tied behind one's back. It was quite apparent that Mr Stephenson was experiencing difficulties with the work, and from the onset, Mr Bryham started to lose confidence in Mr Stephenson's abilities. Mr Bryham's lack of confidence in him increased rather than dissipating. **In all of the circumstances, it is my view that it was unlikely that the employment relationship would have survived beyond the 3 month probationary period.**

[35] Mr Stephenson has already been paid for the work he did plus an additional 2 weeks wages in lieu of notice. **Sealegs International Limited is ordered to pay Mr Stephenson the equivalent of 7 weeks and 3 days wages under s. 128 (2) of the Act, to be calculated at his base salary of \$60,000.00 per annum.**

[36] I am satisfied on the evidence that Mr Stephenson has suffered some humiliation, loss of dignity and injury to feeling as a result of his personal grievance. **Sealegs International Limited is ordered to pay Mr Stephenson \$4000.00 under s.123 (1) (i) of the Act.**

Costs.

[37] Costs are reserved. The parties are requested to attempt to resolve that issue themselves. In the event that costs are not resolved, Mr Bennett is invited to file submissions with the Authority and copy to Ms Butcher within 28 days of the date of this determination. Ms Butcher will have a further 14 days to respond and copy to the Authority and Mr Bennett.

Ken Raureti
Member of Employment Relations Authority