IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 33
5108930

	BETWEEN	John Swaysland Applicant
	AND	Hautapu Motors Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	Bede Laracy for Mr Swaysland Stephen Palmer for the Company	
Investigation Meeting	Palmerston North, 3 March 2011	
Submissions Received	On the day of the investigation	
Determination:	4 March 2011	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Is Mr Swaysland's unjustified disadvantage personal grievance out of time as claimed by the respondent (the Company)? If it is, was the delay occasioned by exceptional circumstances and is it just to grant leave for the grievance to be raised out of time? Were Mr Swaysland's terms and conditions unilaterally altered by the Company such that the applicant is entitled to lost wages and a penalty is applicable?

[2] Each party seeks costs.

[3] Two mediation efforts did not resolve the parties' employment problem.

The Investigation

[4] During a telephone conference on 29 October 2010 the parties agreed to a one-day investigation of the employment relationship problem on 3 March 2011 and to a timeline for the provision of witness statements and an agreed bundle of documents. All references in this determination to page numbers are in respect of the agreed bundle.

Background

[5] Mr Swaysland was employed by the Company as its used vehicle sales manager, Manawatu. His terms and conditions of employment were set out in an employment agreement signed off by the parties on 15 May 2006 (pgs 2-31 inclusive).

[6] By letter dated 30 July 2007 the Company advised Mr Swaysland that, because of concerns about the used vehicle department continuing *"to trade in a loss making situation … and* (because of) … *concerns about your performance* … (and as) *you would have noted in your appointment letter … that your commission structure can be change. Your new package as at the 1st of August 2007 is as follows:"* (pg 33).

[7] During the Authority's investigation on 3 March the parties agreed that the new package resulted in a financial loss to Mr Swaysland of $2,500 nett.

[8] By letter dated 27 August 2007 Mr Swaysland raised concerns with the Company about his changed remuneration and proposed an alternate package (pgs 35-36). The Company says it subsequently discussed those concerns with the applicant (a claim he disputes) but agrees it did not respond in writing.

[9] Mr Swaysland resigned his employment on 30 November 2007.

[10] By letter dated 28 November 2007 his then representative raised, by letter advice of an alleged *"unjustified action"* (pg 48). The remedy sought was, *"A*

reinstatement of the contractual status quo prior to your unilateral action and the agreed cost of this action" (above).

[11] The Company's response of 30 November advised, amongst other things, that it did *"not consider that any personal grievance has been raised within the statutory time frame and* (it did) *not agree to the submission of a … grievance outside* (that) *frame"* (pg 50).

[12] By letter dated 5 December Mr Swaysland's then representative advised, amongst other things, that, *"This is not a personal grievance … this is a claim for financial restitution"* (pg 51).

[13] Mr Swaysland subsequently changed his representative. In an amended statement of problem filed on 23 September 2010 the applicant made clear his alternate claims that he had filed a grievance in time, or that exceptional circumstances applied such that he should be permitted to bring his grievance out of time.

[14] As noted above, the parties have undertaken mediation on two separate occasions, the most recent post-dating the amended statement of problem filed on 23 September, but the problem remains unresolved.

Discussion and Findings

Application for Exceptional Circumstances

[15] I am satisfied from a close scrutiny of Mr Swaysland's advice to the Company of 27 August 2007 (pgs 35-36) that it does not amount to notice of an alleged unjustified disadvantage. It is instead a proposed alternate remuneration package. No mention is made in the letter of a grievance or of words to that effect. I am satisfied a fair and reasonable employer, objectively measured, would not have taken it as notice of the same.

[16] Besides, Schedule 1 of Mr Swaysland's employment agreement sets out the steps required for raising a grievance. Those steps reflect the provisions of the Act.

If, as the applicant now claims, his letter was notice of a grievance, he clearly failed to take the matter any further (when the employer failed to grant the remedies he sought), until much later and after he resigned his employment, by which time the matters now complained of were outside of the 90-day statutory period. Mr Swaysland has clearly not complied with the relevant steps set out in his employment agreement.

[17] During my investigation I put the following direct question to Mr Swaysland: did he instruct his then representative to file a grievance on his behalf? Mr Swaysland answered "*No*". Sub-section 115 (b) of the Employment Relations Act 2000 (the Act) specifically requires an employee to make "*reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee*". Mr Swaysland's evidence is clear that he did not make any arrangement to have his grievance raised. He further explained, during the investigation, that he accepted his then representative's advice, that – for various reasons – it would not benefit him to raise a grievance. His then representative's clarification to the Company of 5 December 2007 (pg 51) is clear evidence of the applicant's stance, at the time. Mr Swaysland did not make reasonable arrangements to have his agent raise his grievance. It is therefore not appropriate to exercise the Authority's discretion in favour of the applicant and grant leave for this matter to be brought out of time: *Melville* v *Air New Zealand Ltd* [2010] NZCA 563.

[18] As the statements of problem filed on Mr Swaysland's behalf suggest that the unilateral variation to his terms and conditions of employment caused the applicant to lose trust and confidence in his employer, and therefore lead to his resignation, for completeness' sake I record here my finding that any alleged unjustified dismissal claim would also be out of time as no communication in respect of that matter appears on the record before the filing of his first statement of problem on 27 August 2010, almost 3-years after the applicant's resignation.

Claim for Lost Wages

[19] In its notice to Mr Swaysland of 30 July 2007, the Company relied on a claim that his commission structure could be changed because of provisions in his appointment letter dated 19 April 2006. That letter provides for, amongst other

things, that (verbatim): *"Commission structure can change from time to time and any such changes will be notified to you in advance of changes as per employment contract"* (pg 2).

[20] It also claimed Mr Swaysland agreed to the changes.

[21] In fact the parties employment agreement does not provide for any changes to Mr Swaysland's commission structure (refer to *"Schedule 2, Remuneration Details"*, in particular (pg 27)).

[22] I therefore do not accept the Company's claim that contractual provision existed to effect the change it made.

[23] In the absence of any written record of consultation about proposed changes and his agreement as claimed by the Company, I also prefer Mr Swaysland's version of events, that enjoyed no notice of the 'proposed' change, the change was by way of a very short notice unilateral variation and that the Company ignored his proposed alternative.

[24] I am reinforced by my conclusion as to the absence of consultation, and agreement by the applicant, by a letter dated 31 January 2007 and produced by the Company during yesterday's investigation makes no mention, in respect of concerns about Mr Swaysland's performance, that a changed remuneration structure was a possibility if improvement did not occur.

[25] For the reasons set out above, I am satisfied the Company was not entitled to vary the parties' employment agreement and Mr Swaysland is entitled to be remunerated on the basis of their only employment agreement.

Penalty

[26] A penalty is claimed against the respondent for breaching Mr Swaysland's employment agreement by way of a unilateral variation.

[27] In *Xu* v *McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

> *In determining the quantum of penalties to be imposed for the breaches of the ERA … the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question … was: was the breach technical or inadvertent, or was it flagrant and deliberate?*

[28] The importance of adhering to employment agreement (and thereby legislated) obligations is fundamental if not self-evident to parties' good faith obligations in the context of an employment relationship.

[29] The respondent's breaching of its contracted remuneration obligations to Mr Swaysland was, on its face deliberate and, in light of his proposed but unanswered response, sustained.

[30] Significant harm has been occasioned Mr Swaysland by the unilateral variation to his remuneration package as he was denied monies owed to him. This harm will not be fully put right by paying him the agreed loss as he has not sought interest on the monies he is owed. A penalty will bring home to the Company that its behaviour was unacceptable. It will clearly deter others also. The breach was not technical or inadvertent, but was deliberate and prolonged. On balance, and by way of applying *Xu* (above), I am satisfied a penalty of $1,000 is appropriate and that, in lieu of interest, half of it be paid to the applicant: s 136 (2) of the Act applied.

Determination

[31] Mr Swaysland's alternate claims he filed a grievance in time or that exceptional circumstances apply such that it is just to allow him to bring a grievance out of time do not succeed.

[32] Mr Swaysland's claim that the Company unilaterally varied his employment agreement and he is owed, as a result, $2,500 (two thousand, five hundred dollars) nett does succeed.

[33] The Company is also to pay a penalty of $1,000 (one thousand dollars) for unilaterally breaching the applicant's employment agreement, half of which is to be paid to Mr Swaysland with the remainder going to the Crown.

[34] Costs are reserved.

[35] I note here that, subject to submissions, costs normally follow the event. Mr Swaysland's representative advised that costs to date, excluding mediation, were of the order of $6,000. His client has succeeded with a significant portion of his claim. The investigation was concluded in half a day. Communication issues between the parties before the investigation did not interfere with a speedy investigation on the day. Mr Swaysland might therefore expect to recover a contribution to his costs of, at best, up to $2,000.

Denis Asher
Member of the Employment Relations Authority