Determination Number: AA 29/06
File Number: AEA 1050/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Neil Richard Taylor (Applicant)
AND	eCOM New Zealand Limited (Respondent)
REPRESENTATIVES	Neil Richard Taylor In person Chris Patterson, Counsel for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	17 January 2006
ADDITIONAL EVIDENCE TAKEN	25 January 2006 9 February 2006
DATE OF DETERMINATION	
SUBMISSIONS RECEIVED	17 January 2006 from Respondent 27 January 2006 from Applicant

DETERMINATION OF THE AUTHORITY

The applicant, Mr. Neil Taylor, says that he has been unjustifiably disadvantaged and unjustifiably dismissed by the respondent, eCom New Zealand Limited. He also says that he has not been paid performance incentive bonuses as required by his employment agreement and that he is owed wages. eCom denies all the allegations.

Mr Taylor had sought reinstatement but this was withdrawn at the beginning of the Investigation.

During the course of the Investigation the parties agreed to deal with the personal grievances only and to leave the issue of arrears for a further meeting and determination should that be necessary following my determination regarding the interpretation of the performance incentive clause in the employment agreement.

Mr. Taylor was employed by eCom as its Business Development Manager. His job was largely to source and close new business for the company.

Complaints

On 8 June 2005 Mr. Aaron Cornelius, a director of the respondent, received a complaint from a Mr. Parish Samuel, the National Credit Manager of Coca-Cola Amatil, a client of eCom's. Mr. Paul

Miller, the IS manager, had emailed Mr. Samuel saying he would "prefer this Neil person not to be involved... if possible". Mr. Samuel then emailed Mr. Cornelius:

> *Hi Aaron*
> *Please treat this as confidential.*
> *Both Donna Wright (CIO) and Paul Miller (see below) feel that Neil is putting undue pressure on them and seems to have painted a picture that our system, in its current form, is in dire straits when he met with Donna.*
> *They would prefer not to deal with him in future.*
>
> *Can you plse get someone in the team to provide the below requirements from Paul so we can get this off the ground.*

Mr. Cornelius removed Mr. Taylor from dealings with Coca-Cola Amatil and tried to smooth things over.

Mr. Cornelius said he had also had unfavourable comment about Mr. Taylor from several staff at eCom. These related to his manner and attitude. He spoke to Mr. Taylor about this and hoped he would "pull his head in".

On 29 September he received the following email from Mr. Bill Kearney, the Vice President for Stellent, which provided the technology for eCom:

> *Subject: We need to speak*
>
> *Hey,*
>
> *When you get back from holiday, we need to speak about Neil's conduct during the site visit with Fosters. It was pretty off the hook.*

On 30 September Mr. Cornelius was contacted by Mr. Mark Smith, the general manager of APN Holdings Ltd, advising that he was not comfortable dealing with Mr. Taylor or with Mr. Taylor's knowledge of the system. Upon contacting Mr. Smith and Mr. Kearney Mr. Cornelius was told that neither of them wanted to deal with Mr. Taylor and that in their view Mr. Taylor was bringing the company into disrepute. Mr. Cornelius decided he had to investigate the complaints.

On 4 October 2005 Mr. Cornelius sent an email to Mr. Taylor stating that eCom had received complaints about Mr. Taylor from clients, staff and a major supplier. He wrote:

> *The complaints that have been raised with me have made me wonder whether I have made a mistake in recruiting you. I need to meet with you this week to discuss the complaints and more importantly your future with eCom. I am currently taking legal advice to ensure that I meet all my obligations towards you. I intend to have the company's legal advisor at our meeting. I suggest that if you want to have the benefit of legal advice you do the same.*
>
> *I want to meet with you at 9:30 AM this Friday. I intend to put together an offer for you to consider in respect of your employment with eCom. As such, I want our meeting to be conducted on a without prejudice basis. Please confirm your agreement. If not, then the meeting will proceed, albeit on the record.*

Mr. Cornelius said he was very concerned about the complaints and that he decided to conduct an investigation to ascertain whether the matters that had been raised were isolated issues or a small

part of a larger problem. He intended to give Mr. Taylor the information he had regarding the complaints at the meeting of 7 October.

Mr. Taylor instructed a solicitor who, on 6 October, not surprisingly asked for full details of the complaints before a meeting could take place. These were not provided at this stage.

7 October

Despite this, it appears that an off the record meeting to try and resolve the matter did take place on 7 October but that no resolution was reached. Mr. Cornelius said he understood from his solicitor that mediation should be the first step in resolving employment issues, hence the off the record meeting.

After the meeting, Mr. Cornelius emailed Mr. Taylor asking him to attend a meeting on 10 October to discuss the possibility of a suspension pending the outcome of his investigation. The same day Mr. Blair Edwards, Mr. Taylor's solicitor, indicated verbally to Mr. Patterson, eCom's solicitor, that Mr. Taylor would not attend on 10 October and wrote objecting to the possibility of a suspension. In the same communication Mr. Edwards raised the fact that Mr. Taylor had an issue with the company regarding the non-payment of his performance incentive, which was said to amount to around $90,000.

Mr. Patterson notified Mr. Edwards that eCom agreed to the meeting being postponed until 11 October, at which time Mr. Edwards would be available. Mr. Patterson also wrote:

> *In the meantime, your client is not to return to work until the meeting is due to take place. Your client is suspended on full pay in the interim until my client can make a decision as to whether it is appropriate to suspend him pending the outcome of its investigation.*
>
> *My client has now commenced its preliminary investigation into the complaints that have been raise against your client. It intends to comply with your request in respect to the details of the complaints once it has concluded its preliminary investigation. My client wishes to present your client with all of the information that it has at that time rather than supply your client with information as it comes to hand.*

Mr. Patterson conceded during the Investigation Meeting that this suspension was unjustified.

On 7 October Mr. Taylor's computer access was removed. Prior to this, Mr Cornelius had discovered that over 3000 emails had been deleted. He had asked to see the status of Mr Taylor's company account and the email account. Mr Cornelius had searched for emails and for the ACT database which should have had customer contacts. As a result of this, Mr Hamish Gribben, the company's IT person, found that emails had been deleted and subsequently performed a data recovery in Exchange 2003.

10 October

Ms Latimer of Kensington Swan advised on 10 October that Mr. Taylor would not be attending on 11 October. She said:

> *There is no point in my client attending the meeting. The outcome has been totally predetermined. Mr. Taylor has not received any details of the alleged complaints made against him and as a result of this, he has not had an opportunity to defend himself.*

Mr. Patterson advised that eCom wanted to meet on 14 October to put the allegations to Mr. Taylor and denied that there had been predetermination He went on to state:

> *My client's decision is that your client will be suspended on full pay pending the completion of its investigation into the complaints that have been raised with him.*

Mr. Taylor was asked to return his laptop.

11 October

Ms. Latimer asked for the reasons for the suspension to be supplied and advised that Mr. Taylor would not attend the meeting until he had received details of the allegations.

Mr. Patterson emailed Mr. Edwards saying that Mr. Taylor was suspended in the interim. The return of the laptop was requested. After discussion the laptop was cloned and a computer forensic expert, Mr. Thackeray, prepared a report which was sent to Kensington Swan on 13 October. The next day Kensington Swan asked for a copy of the CD Rom referred to in the report. Mr. Taylor refused to attend a meeting until the CD Rom had been supplied. The company replied that it had not relied on any of the content of the CD Rom but did offer Mr. Taylor access to it.

Mr Cornelius did view the CD Rom and it was made available to Mr Taylor, who viewed it, probably between 14 and 18 October. During the Investigation it emerged that Mr Taylor had copied it and still had the copy on his home computer. As the information was company information Mr Cornelius was very concerned.

It was therefore agreed that Mr Taylor would retain the information until the Authority's investigation, including any subsequent investigation regarding arrears, was completed; and that a forensic expert, Mr John Thackeray, would contact Mr Taylor and clone the hard drive and deliver a copy to the Authority.

14 October Meeting

Mr. Taylor was supplied with a copy of the allegations at this meeting. He was supplied with a one page sheet headed "Report Findings – Investigation into Neil Taylor". He was also given copes of the complaints. The concerns raised can be summarized as follows:

- Complaints from staff and customers
- Emails regarding job applications not being forwarded
- Confidential information emailed to Mr. Taylor's personal email address
- Refusal to return the laptop
- Deletion of 3000 emails from the company's mail server
- Deletion of customer information from the laptop
- Advising APN that he did not see eCom as a long-term employment prospect
- Operating his own businesses without consent
- Irreconcilable breakdown with Mr. Cornelius

Stress

On 18 October Mr. Edwards advised that Mr. Taylor would not be attending the meeting scheduled for 19 October due to stress and asked that the meeting be rescheduled to 25 October. That same day eCom advised that the suspension was lifted and that Mr. Taylor had been placed on special leave for the rest of the week which was when Mr. Taylor's medical certificate expired.

On 19 October eCom sent a letter asking that Mr. Taylor sign a Privacy Act waiver regarding his illness. This request was verbally refused when the parties met on 25 October, at the conclusion of which Mr. Taylor was placed on special leave pending a response for him to sign the Privacy Act waiver.

25 October Meeting

Mr. Taylor read from a written document and provided supporting documents. Mr. Taylor addressed his product knowledge, and his development of "new marketing collateral". On the most important of the issues, the complaints, he expressed incredulity regarding what had been said about him, said he was dumbfounded and that "none of these comments are backed by any true evidence". He denied not passing on information, deleting emails from his laptop or deleting any customer information, saying the details were in ACT folder. Mr. Cornelius told me he had attempted to access this but the password provided by Mr. Taylor did not work for any of the ACT folders. He denied operating a company without Mr. Cornelius' knowledge and said it had been inactive although still registered. He also disputed that there had been an irretrievable breakdown.

He was told that eCom expected to be in a position to make a decision by the following afternoon. Mr. Taylor was asked whether he wanted to attend in person to hear the decision or whether he wanted to be given it in writing. His preference was for the latter.

28 October Letter of Dismissal

Mr. Cornelius concluded that Mr. Taylor had not provided an adequate explanation for the complaints, that he did not understand the need for good relationships with customers; that he had not forwarded emails, had admitted he had forwarded confidential information without authorization and he accepted Mr. Thackeray's report rather than Mr. Taylor's denials. He also concluded that there had been a breach of trust and confidence.

Justification

There were a number of reasons given for the dismissal. When I asked Mr Cornelius about these he said that he would have dismissed Mr Taylor on the basis of the complaints alone because his company depended on maintaining good relations with its few very good customers; and it would be in jeopardy if those relationships were compromised.

In Auckland Local Authorities Officers' Union v Northcote Borough Council [1989] 2 NZILR 67 the Labour Court held that an employer was not obliged to justify each and every reason for dismissal provided that the employer discharged the onus of justifying the dismissal. In NZ Baking Trades Employees' Union v Findlays Gold Krust Bakeries [1989] 2 NZILR 633 the Court considered what the dominant or primary reason for the dismissal was. The failure to prove other grounds for the dismissal may not render the dismissal unjustified: Zendel Consumer Products Ltd v Henderson [1992] 2 ERNZ 377, 380.

Mr Cornelius was entitled to find that the complaints had substance and to be very concerned about them. I cannot accept Mr Taylor's submission that the customer issues were not a "reasonable reason" for dismissing him and that they were merely performance issues, if that and stemmed from eCom issues.

While some of the other reasons, e.g. the Flexiwire issue(which Mr Cornelius accepted he did know about) and telling APN that eCom was a short term employment prospect were not substantive

grounds for dismissal in themselves; and while there was confusion over where the emails were deleted from it is clear that the issue of the complaints was in itself adequate grounds for a termination. I also accept that there was a clear breakdown in the relationship of trust and confidence.

The minimum standards of fair and reasonable dealing are set out in NZ Food Processing Union v Unilever NZ Ltd (1990) 3 NZELC 97,567 at 97,577. These are notice of the specific allegations and the likely consequences if they are established, a real opportunity to refute or explain and an unbiased consideration of the worker's explanation which must be free from predetermination and uninfluenced by irrelevant factors.

I was troubled by the notification of redundancy. It bears the appearance of an employer desirous of ridding himself of an employee. When asked, Mr. Cornelius said the company was not in a good financial state, that no new business had been closed, that the company had incurred considerable expense in marketing and rebranding for no financial reward and consequently he could not see the need for the position. I accept Mr Cornelius' rationale for considering that the Business Development Manger's position might be superfluous but the timing of the notification was not the wisest.

It is clear that Mr. Cornelius had formed the view that it was likely there was substance to the allegations. That in itself, however, does not mean the outcome of the investigation was predetermined. It would not be unusual to form a preliminary or tentative view and provided that view is susceptible to change, should there be evidence to require that, it cannot be said that the outcome would be predetermined.

The decision to dismiss was one which a reasonable employer could have taken in the circumstances.

The Suspensions

The two suspensions, one of which has been conceded to be unjustified, and the other which I find was also unjustified, add weight to the claim of predetermination. The second suspension was unfair because the employer did not supply the information as requested. Also, given the previous suspension, the applicant's concern about a fair hearing regarding this was understandable.

Mr Taylor gave no evidence regarding the effect of the suspensions on him. This was so even when Mr Patterson asked him about the suspensions. In light of that, I am unable to make any award for humiliation and distress.

Performance Incentive

The relevant clause reads:

> *Remuneration*
>
> *A performance incentive of 5% will be paid on all new business closed from new or existing clients. There is no cap on the level of incentive paid.*

Mr. Taylor contends that he is entitled to a performance bonus regardless of whether he had any involvement in the closing of the new business. The respondent says that the entitlement to an incentive arises only if new business has been closed as a result of Mr. Taylor's efforts.

Implication of terms

In A-G v NZPPTA [1992] 1 ERNZ 1163 the Court of Appeal summarized the four grounds for the implication of terms:

1. The business efficacy approach set out in BP Refineries Ltd v Hastings Shire Council (1977) 52 ALJR 20;
2. Interpretation of the provisions of the contract by reference to an underlying assumption on which it was concluded. This involves finding the reasonable expectations of the parties to be implicit in the language. Construction is in accordance with what is to be reasonably understood by someone in the shoes of one party as to what the other party agreed to.
3. Custom;
4. Implication by rules of law.

In Madison Systems Ltd v Scott [1999] 2 ERNZ 154 the employee had advance commission payments made and disputed that he had to repay them on his resignation. Colgan J held that it was an implied term that any advances made would be repayable in the event of the employment ending before sales were made. It was not enough that the Court thought it reasonable to imply a term. The term implied must:

- Be reasonable and equitable;
- Be necessary to give business efficacy to the contract, this meaning that no term will be implied if the contract is effective without it;
- Be so obvious that "it goes without saying";
- Be Capable of clear expression;
- Must not contradict any express terms of the contract.

It is difficult to see how a performance incentive can be something that is not dependant on performance; and logically that performance has to be Mr. Taylor's performance, not the company's performance. I agree with Mr Patterson that a performance incentive that has nothing to do with performance is contradictory. The provision is, after all, a provision in an individual employment agreement. The argument mounted by Mr. Taylor would lead to the implication of a term that would be neither reasonable nor equitable. To obtain a reward for no effort when that reward is termed a performance incentive is illogical. Business efficacy would not be given if Mr. Taylor's interpretation were correct: the company would be paying out money that it did not need to pay out. That the payment is contingent on Mr. Taylor's efforts is quite simply so obvious that it goes without saying.

From the evidence, I do not think that Mr. Taylor himself had any expectation that he would be rewarded for no effort. The term implied would be one which the parties would have agreed if they were being reasonable: Courtualds Northern Spinning Ltd v Sibson [1988] IRLR 30 at 309.

The parties agreed that they would put the issue of arrears into abeyance until such time as I made a decision about the interpretation of this clause. Mr. Patterson suggested that mediation might be a useful mechanism for resolving what, if any, entitlements Mr. Taylor has. If the parties do not agree to mediation, Mr. Taylor should contact the Authority and a further Investigation to determine the matter of arrears can then be arranged.

Costs

I will leave the matter of costs for a determination, should that be necessary, after the matter of the arrears has been dealt with.

Dzintra King
Member of Employment Relations Authority