

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 319
3011631

BETWEEN LOUIS WANNENBURG
 Applicant

A N D THETA SYSTEMS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: David Fleming, Counsel for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 30 and 31 August 2017 at Auckland

Submissions Received: 23 August 2017 from the Applicant
 23 August 2017 from the Respondent

Date of Determination: 12 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr Louis Wannenburg, was unjustifiably dismissed by Theta Systems Limited (Theta).**
- B. In order to settle Mr Wannenburg’s personal grievance claim, Theta is to make payment of the following sums to him within 21 days of the date of this determination:**
- (a) \$20,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal;**
- (b) \$ 23,133.36 gross in lost remuneration under s.128 of the Act.**

C. Costs are reserved.

Employment relationship problem

[1] The respondent, Theta Systems Limited (Theta), specialises in analytics strategy, digital solutions and business systems¹. Theta employs IT consultants to deliver its technology solutions and systems to its customers throughout New Zealand.

[2] The applicant, Mr Louis Wannenburg, was employed as a senior consultant by Theta pursuant to an individual employment agreement dated 30 August 2013. Mr Wannenburg started employment in late September 2013 and was responsible for developing and delivering business technology services to a number of Theta's customers.

[3] Mr Wannenburg was dismissed by Theta with effect from 6 December 2016. Theta says the dismissal was justified. There had been issues with Mr Wannenburg's attitude at work and his behaviour with customers from early on in his employment. He was spoken to, but the same behavioural and attitudinal issues resurfaced during the course of his employment.

[4] Following a customer concern raised in July 2016 about Mr Wannenburg's behaviour, Theta developed a formal Personal Improvement Plan (PIP). A disciplinary process was commenced by Theta in November 2016 after it received further concerns from customers about Mr Wannenburg. This process led to Mr Wannenburg's dismissal on 22 November 2016 effective from 6 December 2016.

Theta's reasons for dismissal

[5] Theta says that Mr Wannenburg was given the opportunity to address the issues raised with him on a number of occasions during the course of his employment including during the final disciplinary process. However, Theta says Mr Wannenburg's responses were such that it was not confident the issues would not continue to resurface.

[6] Theta says it lost trust and confidence in Mr Wannenburg as its employee. Theta acknowledges Mr Wannenburg's technical competence was good and never an issue. However, the behavioural and general attitudinal problems were such that it

¹ Website: www.theta.co.nz

could not continue with his employment, which it considered could jeopardise its ongoing relationships with key customers. Theta considered dismissal to be appropriate in all the circumstances.

Mr Wannenburg's claims of unjustified dismissal by Theta

[7] Mr Wannenburg says his dismissal by Theta was both procedurally and substantively unjustified. Mr Wannenburg says very early on in his employment there was a single issue with a customer with whom he was working. The matter was relatively minor and related to his use of a laptop while working on its project. The matter was not raised directly by the client with him, it was raised with his manager, Mr Adrian Simpson, who in turn brought it to his attention. The matter was resolved with the customer and Mr Wannenburg says that was the end of the matter. Theta had no reason to and did not take any disciplinary steps about the matter. Mr Wannenburg says that over the next two-and-a-half to three years Mr Simpson spoke to him about one or two matters involving clients but these were never raised in the context of a performance or disciplinary process.

[8] In April 2016, Mr Wannenburg says he was promoted to the role of Lead Consultant to reflect his technical competence and ability to do the job. Mr Wannenburg says there was an issue with a client in mid-July 2016. Without discussion with him first, Theta put in place a PIP process. The PIP related to that customer only and there was no follow-up to the PIP.

[9] Mr Wannenburg says on 13 November 2016, a Sunday, out of the blue he received an email with a letter attached informing him Theta was initiating a disciplinary process. Mr Wannenburg says the disciplinary process was not a fair one. The issues raised were vague and no concrete issues were put to him to address.

[10] Mr Wannenburg says he was dismissed with effect from 6 December 2016, and paid out one month's salary. The dismissal was a complete shock to him and caused considerable financial and emotional stress for him and his wife, Mrs Karin Wannenburg.

[11] The time of the year in which Mr Wannenburg was dismissed prevented him from obtaining another job until 6 March 2017. During this time, Mr Wannenburg says he had to take urgent steps to ensure that his and his wife's financial security was not severely jeopardised. This included seeking a mortgage holiday from the bank.

[12] As a result of what Mr Wannenburg says is an unjustified dismissal, he seeks reimbursement of lost remuneration and benefits, compensation for the humiliation, loss of dignity and injury to feelings he said he suffered, and costs.

The investigation meeting

[13] As permitted by s.174E of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues, and makes conclusions in order to efficiently dispose of the matter.

[14] The investigation of the matter took two full days in the Authority.

[15] For the Authority's investigation, Mr Wannenburg and his wife, Mrs Karin Wannenburg, filed witness statements. For Theta, Mr Gary Blumgart, Head of Analytics, Mr Paul Young, Commercial Manager, and Mr Adrian Simpson, Practice Lead, each filed a witness statement.

[16] Each witness affirmed or swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

The issues

[17] The issues for determination by the Authority are as follows:

- (a) Was Mr Wannenburg's dismissal by Theta justified?
- (b) If Mr Wannenburg's dismissal was not justified, is he entitled to remedies?
- (c) If Mr Wannenburg is entitled to remedies, was there any contributory conduct on his part which would reduce the remedies?

First Issue

Was Mr Wannenburg's dismissal by Theta justified?

Individual Employment Agreement

[18] Mr Wannenburg began his employment at Theta as a senior consultant in late September 2013. He had an individual employment agreement which included a job

description setting out his primary task to be “architecture, design and development intelligence and data warehousing services and projects”. Mr Wannenburg’s employment was subject to a three month probationary period so that his performance could be monitored and he could be told about any “performance shortcomings”.

[19] Clause 1.4 of Mr Wannenburg’s employment agreement provides for performance objectives which Theta, in consultation with Mr Wannenburg, was to set each year. These objectives were to be taken into account when Mr Wannenburg’s performance was assessed by Theta each year.

[20] Clause 1.5 of the employment agreement provides that performance reviews would be undertaken on an annual basis.

Customer complaint - November 2013

[21] In mid-November 2013, during the probationary period, an issue was raised by ANZ, a customer of Theta, about Mr Wannenburg’s use of his Theta laptop whilst working on one of its projects. Mr Wannenburg’s manager, Mr Adrian Simpson spoke with Mr Wannenburg about the matter, obtained an explanation and there was no further issue in relation to the matter. No disciplinary steps were taken in relation to the matter and Mr Wannenburg was of the view that the issue had been resolved.

[22] At the Authority’s investigation meeting, Theta provided the Authority with emails in relation to the issue. The emails were between the customer and Mr Simpson, copied to Mr Blumgart, but these were never disclosed to Mr Wannenburg at the time for his comment.

[23] It is clear from the emails that were disclosed that the concern related to Mr Wannenburg’s attitude, not competence or skill.

[24] Mr Paul Young, the Commercial Manager with Theta who was responsible for the disciplinary process which culminated in Mr Wannenburg’s dismissal says there were a “range of attitudinal issues that were of concern” ... and that the meeting on 15 November 2013 to discuss the issue with ANZ was a “formal meeting” and “there could not have been any misunderstanding that Mr Wannenburg needed to improve”

[25] I do not accept Mr Young’s evidence. The matter involving ANZ was never elevated in my view to anything more than a discussion. This would be a normal response by an employer, to a complaint by a customer about a member of staff.

There was no notification given to Mr Wannenburg prior to the meeting in mid-November 2013 that there was a concern of a disciplinary nature and the emails disclosed to the Authority at its investigation meeting about the matter were never disclosed to Mr Wannenburg.

[26] Following the meeting on 15 November 2013 to discuss the ANZ matter, Mr Wannenburg says he continued in his role of senior consultant working on a number of projects with some of Theta's key clients. Mr Wannenburg says he consistently received positive feedback from his clients and was awarded a pay increase each year. There were no performance reviews by Theta which indicated any serious concern about his performance.

[27] Mr Simpson, to whom Mr Wannenburg reported during the period of time between 2013 to 2016 says, following the meeting on 15 November 2013, he had follow-up meetings with Mr Wannenburg to provide counselling and support. This evidence differs from that of Mr Wannenburg who says there were no meetings with Mr Simpson that he would regard as providing him with counselling and support. He was largely left on his own to perform the work for clients. Mr Simpson was unable to provide the Authority with any notes, informal or otherwise, in respect of his follow-up meetings with Mr Wannenburg.

Customer complaint - June 2014

[28] Mr Simpson says that in 2014, he received a "very strong" verbal complaint about Mr Wannenburg's performance, by Theta's head of project office. The matter was in respect of Mr Wannenburg's attitude when working with one of Theta's clients. An email was sent from Mr Simpson to Mr Wannenburg and copied to Mr Blumgart and Mr Young on 9 June 2014.

[29] The email from Mr Simpson says: "Hi Louis, I have received the feedback internally on your performance on the Vector project you were working on and that as a senior consultant more is expected of your role. Specifically there has been a lack of ownership with regards to testing and issue resolution. As a senior consultant you are expected to work independently, take more ownership of project tasks and ensure tasks are completed to an acceptable standard. If there is any uncertainty around what needs to be done or what is expected then please raise with the project manager or myself as early as possible. I will follow-up with a review in 4 – 6 weeks."

[30] Despite the statement by Mr Simpson that there was a “strong complaint” about Mr Wannenburg, there was never any disciplinary or performance process initiated in respect of the matter.

[31] I consider the matters raised with Mr Wannenburg by Theta in November 2013 and June 2014, were in the normal course of the employment relationship. They were not matters which required formal disciplinary action. Rather, Theta was responding to its clients. Theta referred matters raised by its clients directly to Mr Wannenburg. Mr Wannenburg responded accordingly.

[32] Mr Young and Mr Blumgart gave what I would describe as “hearsay” evidence about Mr Wannenburg’s performance. Their evidence was based on discussions they had overheard about Mr Wannenburg. There was nothing concrete in respect of Mr Wannenburg’s performance which in my view could justify a disciplinary process.

[33] Certainly it was clear that Mr Wannenburg’s technical competence was highly regarded and he was promoted accordingly from 1 April 2016 to the role of Lead Consultant. The job description for that role differs from the senior consultant role, in that it is more of a leadership role.

Performance Improvement Plan – July 2016

[34] In mid-July 2016, while Mr Wannenburg was on assignment at one of Theta’s key clients, TVNZ, an issue arose. Again, there was no concern about Mr Wannenburg’s competence in respect of the project.

[35] The concern related to, in Mr Simpson’s words, “his general management and approach to the customer”. The complaint from TVNZ was emailed to Mr Simpson on 1 July 2016. The complaint from the customer related to the volume of personal calls and emails that Mr Wannenburg was receiving and “generally being away from the desk at frequent occasions on the phone”. “Time keeping and an expectation that Mr Wannenburg keep core hours being from 9 am to 4.30 pm.”

[36] The email from TVNZ concluded by saying: “there are no concerns about the quality of deliverables, this has always been consistently good”.

[37] It was after this matter was raised by TVNZ with Theta that a decision was made to implement a PIP.

Disciplinary process – November 2016

[38] In a letter to Mr Wannenburg on 11 November 2016, Mr Simpson says there had been “a number of complaints and concerns recently raised from Theta clients/customers and other staff.” The complaints related to behavioural issues including that customers had a perception that Mr Wannenburg lacked engagement and was not taking his work seriously, being unprepared for meetings and paying insufficient attention to testing requirements which led to delays in his work.

[39] Mr Simpson goes on to state: “it is unfortunate that we find ourselves back in this position, however it is important that we hear from you and understand your response to these most recent complaints. Once we have heard from you and reflected on all the relevant information we will consider where to from here. You need to be aware that the outcome from this process may result in disciplinary action being taken against you up to and including dismissal.”

[40] Mr Wannenburg was informed, in the letter, of his right to legal advice. A meeting was proposed to which he could bring a support person. The details of the customers and complaints were attached to the letter from Mr Simpson.

[41] Mr Wannenburg states that he received an email from Mr Simpson on Sunday, 13 November 2016, attaching the letter dated 11 November 2016. Mr Wannenburg says he was “absolutely shocked” when he received the letter. He says he had no idea it was coming as no customer complaints had been discussed with him.

Disciplinary meeting – 16 November 2016

[42] Mr Wannenburg attended the disciplinary meeting. Mr Michael Hay, Mr Simpson, Mr Young all attended the meeting. Mr Hay had been assigned Mr Wannenburg’s new manager in October 2016. The assignment had not been discussed with Mr Wannenburg before it occurred and he found this unsettling.

[43] Mr Wannenburg recorded the meeting. There was a general discussion about issues primarily relating to Mr Wannenburg’s attitude. Following the meeting, Mr Wannenburg set out in writing, his response and why he should retain his position at Theta.

17 November 2016 meeting

[44] The meeting was attended by Mr Young, Mr Simpson, Mr Hay and Mr Wannenburg. Mr Wannenburg presented his letter at the meeting. Following the meeting, Mr Simpson and Mr Hay were to review the situation and talk with Mr Blumgart.

[45] Mr Simpson, Mr Hay and Mr Young met and reached a “consensus view...that there was a loss of trust and confidence in Mr Wannenburg to make the change that was required of him and to be able to continue his employment with the company. We were all of the view that there had been sufficient opportunity for Mr Wannenburg to address these attitudinal issues which he had been alerted to for quite some time. It was noted that these issues had arisen soon after the TVNZ experience. We did not accept that what was being raised and discussed with him following these more recent complaints were in any way a revelation. We had accepted his explanations on earlier occasions and his commitment to change, but while this would occur on a temporary basis there was no confidence that this would be permanent.”

22 November 2016 – dismissal meeting

[46] A meeting was held with Mr Wannenburg on 22 November 2016. Mr Young and Mr Simpson were at the meeting but Mr Hay was not. At this meeting, Mr Wannenburg says he was informed by Mr Young at the outset of the meeting that Theta did not have confidence in him and that they had made a decision which was to terminate his employment. There were discussions about whether or not the termination could be dressed up as a resignation instead. Mr Wannenburg’s employment was terminated and his employment ended on 6 December 2016. Mr Wannenburg was paid a month’s salary in lieu of notice.

[47] Mr Young’s letter dated 17 February 2017 to Counsel for Mr Wannenburg sets out the reasons for dismissal. The first page of the letter refers to attitudinal issues with Mr Wannenburg and states that “the managers lost confidence in Louis’ ability to bring about permanent improvement in his attitude and his ability to behave professionally on client sites”. On the final page of his letter, Mr Young states “on 22 November 2016 we met with Louis and explained we did not have confidence in him, giving the reasons, and that we had decided to terminate his employment as a result.”

[48] During the Authority's investigation meeting, Mr Young expressed the reason for dismissal as being that Theta no longer had trust and confidence in Mr Wannenburg to make necessary changes to his attitude and behaviour.

The Law

[49] By raising a grievance about his dismissal and bringing it to the Authority for investigation and determination, Mr Wannenburg has required the Authority to apply the test for justification in s.103A of the Act. Under the test, the question of whether the dismissal of Mr Wannenburg was justifiable must be determined, on an objective basis, by considering whether Theta's actions, and how Theta acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[50] In applying s.103A of the Act, the Authority must also consider four particular factors set out at s.103A(3), as well as any others it thinks appropriate.

[51] The test is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

[52] Counsel for Mr Wannenburg referred the Authority to a number of Employment Court decisions relating to dismissals in respect of performance including *Ramankutty v Vice Chancellor of the University of Auckland*². The following statement by the Employment Court in *Ramankutty* is relevant to the current matter:

“Just as with misconduct, the employer must carry out a fair investigation with full participation in it by the employee. Having done that, the employer is then entitled to come to a decision whether the employment of the employee is going to be continued, provided always that the employer has not only followed a fair procedure during the investigation of the complaints about the employee but has also previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which were objectively measurable and have been objectively measured.”³

² EmpC Auckland AC 53B-01, 25 October 2001.

³ At para 23.

[53] I concur with Counsel for Mr Wannenburg that the process followed by Theta culminating in Mr Wannenburg's dismissal, was far short of what is required in cases such as this. Full details of the customer complaints were not provided to Mr Wannenburg at the time of occurrence. There was not an investigation by Theta of the complaints. This was not a minor error in process. Further, after referring complaints from customers to Mr Wannenburg, Theta failed to sufficiently monitor his performance and provide assistance as required. The PIP process in July 2016 was inadequate and not properly monitored.

[54] At the investigation meeting Theta sought to rely on email correspondence which had been exchanged in relation to a complaint by ANZ early in Mr Wannenburg's employment.

[55] However, Mr Wannenburg was not aware of the email exchange and certainly there was no evidence of specifics put to Mr Wannenburg about his so called shortcomings to be addressed.

[56] Right up until the time of dismissal, the managers who made the decision to dismiss, Mr Young, Mr Hay and Mr Simpson all relied on "perceptions" that they had of Mr Wannenburg's behaviour. The statements by Mr Young, Mr Simpson and Mr Blumgart at the Authority's investigation meeting about Mr Wannenburg's performance were general in nature. Mr Young referred to a "range of issues" and "performance concerns". I do not consider those general statements of concern to have been substantiated by the evidence.

[57] No verbal or written warnings were issued to Mr Wannenburg during the period between November 2013 and July 2016 despite Theta taking the position that there were ongoing performance issues. The reality was that in April 2016, Mr Wannenburg was promoted to a role with more leadership. Between July 2016 and November 2016, Mr Wannenburg was not aware that his ongoing employment was in serious jeopardy.

[58] The PIP process in July 2016 was set in motion as a result of a complaint by TVNZ. Time frames with which Mr Wannenburg was required to comply, such as being on site between certain hours, were met by him. A further meeting was to be held at the conclusion of the PIP to "discuss and assess the outcomes and the plan moving forward." This did not occur. In fact there was little or no follow-up or monitoring of Mr Wannenburg by Theta following the PIP.

[59] Rather, some three months after the PIP, Mr Wannenburg received an email on a Sunday night informing him that he was required to attend a meeting concerning some client complaints about his behaviour and attitude and that the outcome may result in his dismissal.

[60] I do not accept that at the time the disciplinary process was put in motion that there was such a level of misconduct on Mr Wannenburg's part that would form a basis for Theta to claim that it had lost trust and confidence in Mr Wannenburg to continue employment with it. Certainly, there were no issues with his technical performance and this was reiterated during the course of his employment.

[61] I find that taking disciplinary action against and the dismissal of Mr Wannenburg was not what a fair and reasonable employer could have done in the circumstances.

[62] The dismissal was not justifiable and Mr Wannenburg has established his personal grievance in that regard.

Second issue

If Mr Wannenburg's dismissal was not justified, is he entitled to remedies?

Compensation under s123 of the Act

[63] Mr Wannenburg gave evidence of his devastation at being dismissed. The dismissal occurred shortly before Christmas. Mr Wannenburg described feeling "humiliated and broken". Mr Wannenburg became frantic about obtaining another job as he and his wife were stretched financially. Mr Wannenburg says he developed major insecurities and lost confidence as he was continually "knocked back" for jobs he applied for. Mrs Wannenburg confirmed to the Authority the serious impact the dismissal had on Mr Wannenburg and his health.

[64] At the date of the Authority's investigation meeting, Mr Wannenburg was still on medication. Mr Wannenburg says he was prescribed medication following his dismissal which severely impacted his enjoyment of life and his confidence.

[65] Mr Wannenburg seeks compensation in the sum of \$25,000 under s.123(1)(c)(i) of the Act for the distress he suffers. Mr Wannenburg relies on the

Employment Court decision in *Stormont v Peddlethorp Aitken Ltd*⁴ in support of his claim for that amount of compensation.

[66] I consider the fact scenario in *Stormont* to differ from the facts in this case. Ms Stormont was the subject of a disingenuous redundancy process which she did not understand.

[67] Mr Wannenburg did accept that some customers had voiced concerns, albeit at times unfounded, about his performance. However, Theta failed to carry out a transparent and proper process to address the so-called deficiencies in Mr Wannenburg's performance. This resulted in an unjustifiable dismissal which had a very serious impact on Mr Wannenburg's health and enjoyment of life.

[68] I consider an appropriate award of distress compensation to be \$20,000. Theta is ordered to pay the sum of \$20,000 in compensation to Mr Wannenburg within 21 days of the date of this determination.

Lost remuneration under s.128 of the Act

[69] Mr Wannenburg was unable to obtain further employment until 6 March 2017. Mr Wannenburg seeks reimbursement of earnings lost by him from the date of termination until the date of the Authority's investigation under s.128 of the Act. Mr Wannenburg lost \$20,783.36 gross in salary to the date of his commencement of his employment in his new job. Mr Wannenburg's salary at his new role is almost \$5,000 gross per annum less than it was at Theta. Mr Wannenburg has assessed his loss as a result amounting to \$2,350 up to the date of the Authority's investigation meeting. Mr Wannenburg seeks payment of the total of his lost remuneration totalling \$23,133.36 gross.

[70] Theta is ordered to pay the sum of \$23,133.36 gross lost remuneration to Mr Wannenburg within 21 days of the date of this determination.

Loss of money as a result of the grievance under s.123(1)(b) of the Act

[71] Mr Wannenburg seeks reimbursement of \$12,995.09 being interest he claims he lost as a result of a 3 month contribution holiday on mortgages.

⁴ [2017] NZEmpC 71 EmpC 48-2016.

[72] Mr Wannenburg says he and his wife were heavily mortgaged as a result of recently renovating their house. Mr Wannenburg says he was the primary income earner and that when he was dismissed they were worried they were going to lose their house.

[73] Mrs Wannenburg earned \$63,000 gross per annum. There was little other information provided to the Authority regarding the Wannenburgs' financial affairs or regarding their situation with their bank to satisfy the Authority that the dismissal resulted in the losses claimed.

Third issue

If Mr Wannenburg is entitled to remedies, was there any contributory conduct on his part which would reduce the remedies?

[74] The Authority is bound under s.124 of the Act to consider whether Mr Wannenburg contributed to his dismissal and if so to remedies awarded. I do not consider a reduction for contribution under s.124 is appropriate on the basis of the evidence. Accordingly, remedies awarded will not be reduced.

Costs

[75] Mr Wannenburg has 14 days from the date of this determination within which to file a submission as to costs. Theta has 14 days upon receipt to file a submission as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority