

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN George Simonovski (Applicant)
AND Harvey Norman Stores (NZ) Pty Limited (Respondent)
REPRESENTATIVES Applicant in person
Emma Huston, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 24 May 2005
DATE OF DETERMINATION 13 September 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant Mr George Simonovski complains that he was unjustifiably dismissed by the respondent Harvey Norman Stores (NZ) Pty Limited (referred to as "HNS"). In his statement of problem Mr Simonovski refers to the fact, which is not disputed, that he was dismissed before a trial period of three months expressly provided in his written employment agreement had expired. Only eight weeks of it had elapsed when he was given two weeks notice, on 24 December 2004.

[2] He complains that there was no substantive or procedural fairness accompanying his dismissal, and also that he was discriminated against on the grounds of his sex and race.

[3] Mr Simonovski was appointed Creditors Clerk at the Manukau store of HNS, on a salary of \$31,500. There are about 37 Creditors Clerks in the HNS chain. He commenced his new job on 8 November 2004.

[4] HNS management initially wondered whether the position might prove not to be challenging and stimulating enough for Mr Simonovski, as his CV represented that he had qualifications and experience appropriate for a more senior position requiring a much higher level of skill to be exercised.

[5] His CV refers to a Bachelors of Accounting obtained in Macedonia, his home country, and also to employment experience gained with firms in New Zealand since 1997 in customer services and bookkeeping. He describes himself in the CV as being committed to that kind of work.

[6] Mr Simonovski's CV refers to his achievements as;

*Keeping books, accounts payable and receivable, payroll, PAYE, GST Returns, EBT,
Trial Balances etc. in timely and precise manner,
- Constantly improving my MYOB and EXCEL active knowledge,*

- *Establishing association with other accountants.*

[7] It is quite obvious from his accent and form of expression that English is not the first language of Mr Simonovski, but there has been no suggestion by him or by HNS that this played any significant part in the employment difficulties that developed soon after he commenced. It is also obvious that Mr Simonovski is intelligent and quick-witted. He presented to the Authority as a person who is both engaging and who likes to engage with others.

[8] HNS became dissatisfied with the progress he was making toward learning the work required of him as a Creditors Clerk.

[9] I am fully satisfied from the evidence of four HNS employees who were closely involved in training and overseeing Mr Simonovski from commencement of his employment, that he was provided with thorough training suitable for the position of Creditors Clerk. Further I am satisfied that this training was readily continued by HNS past the point where normally it would no longer be needed, and that it was tailored to the particular problems HNS identified on a daily basis with Mr Simonovski with his progress and performance. The training was also intensified to become one-on-one, when special measures were needed to be taken.

[10] Despite what I consider to have been every reasonable effort made by the employer and a high level of attention given by it toward Mr Simonovski, he proved unable to learn the relatively straightforward work. I accept that the problem did not lie with his comprehension or understanding but with his lack of concentration and inability to follow instructions. Although he was given comprehensive written instructions in a manual he retained, he still did not progress but continued to make mistakes. He simply proved unresponsive to coaching on basic skills and seemed to have his own idea of how he would achieve mastery of the work.

[11] I am satisfied that HNS did not prematurely write-off Mr Simonovski as being too hard to train but persevered in this regard. It tried using different people, all of whom were experienced and competent to train in the particular job. By early December HNS viewed the situation as serious when Mr Simonovski was not responding as he ought to have been by then after receiving that degree of training.

[12] I accept that past experience has shown HNS that new creditors' clerks can be trained in about three weeks to a point where they are able to start working independently.

[13] On 25 November 2004 the Administration Manager, Ms Julie Jenkins, informally reviewed his progress in training with Mr Simonovski and, I find, told him it was unsatisfactory. She identified the improvements needed from him. A few days later on 29 November, Ms Jenkins spent a day closely watching and trying to help him. She observed him to be slow, inaccurate and disorganised, despite the training he had been receiving. In a memorandum written to Ms Jenkins on 3 December, Mr Simonovski acknowledged that he was having these difficulties and he requested more training.

[14] This was given but there was still no significant improvement shown. The Northern Regional Administration Manager of HNS wrote to Mr Simonovski on 13 December, advising that an extra two hours training a day would be given to him for two weeks until 23 December 2004. The letter concluded with the following;

George, it is fair to say, that if your performance has not improved by the end of this period, that it is possible that your employment with Harvey Norman could be terminated.

[15] I find that despite the special training provided in the fortnight period there was no appreciable improvement shown by Mr Simonovski. His personal mannerisms and habit of interrupting provided some obstruction to training. I accept as fair and accurate an assessment made by his employer that even after one and a half months of training Mr Simonovski had only learned what would normally be picked up by other trainees in just a few days. He was made aware by Ms Jenkins that the fortnight of training was not going well for him.

[16] HNS formally advised Mr Simonovski of this on 23 December and asked him to attend a meeting next day to discuss the situation. He was invited to have a support person present and was warned that dismissal was a possible outcome of the meeting. At the end of the meeting held on 24 December, HNS decided to dismiss Mr Simonovski and gave him the required two weeks notice of that, although the employer elected to pay him for that period.

[17] There is no absolute rule of employment law that a trial period where stipulated in the employment agreement must be allowed to run its full term before an employer can dismiss for poor performance. Cases such as *Nelson Air Ltd v NZ Airline Pilots Association* [1994] 2 ERNZ 665 (Court of Appeal) and *Slater v Smith* [1994] 1 ERNZ 869, make it clear that an employer may terminate employment during a trial or probationary period, provided it has just cause to do so and acts fairly. I find that was the situation here and that despite a high and sustained level of practical assistance offered to Mr Simonovski, he could not meet the requirements of his job and showed no reasonable prospect of being able to do so if the trial period was continued.

[18] I am satisfied that HNS acted fairly towards Mr Simonovski throughout his employment in relation to the provision of training and the assessment of his progress with that. Further, HNS acted fairly in the way the problem was addressed as a disciplinary one. In those circumstances the assessment made by the employer of performance was for it to make and its decision must be regarded as one that was open to a fair and reasonable employer viewing all the relevant circumstances objectively.

[19] In the circumstances there is no basis on which Mr Simonovski could claim that he thought his trial period would run for the full term of three months. He was alerted to the problems HNS had with his performance and he was expressly warned of the threat those problems created to his continuing employment.

[20] The claims of race and gender discrimination are imaginative and without any factual basis, I find. Mr Simonovski complained that as a man he had fallen victim to a coven of female supremacists thriving within HNS. Unfortunately he seems to have paid more attention to an offhand remark made by a female colleague (about herself) at a Christmas function, than he gave to the knowledge his trainers had tried to impart to him. The timing of complaints about the behaviour of his female co-workers suggests it was made to deflect attention away from the real issue at hand, the work performance of Mr Simonovski himself.

[21] In conclusion therefore, I determine under the current legal test of justification (as enacted from 1 December 2004 by s.103A of the Employment Relations Act 2000) that the dismissal of Mr Simonovski by HNS was justified. Objectively, the actions of HNS were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. There was good cause given for that action and it was carried out in a fair and reasonable way in the circumstances. Work standards were clearly set, realistic opportunities for demonstrated improvement were offered, and disciplinary warnings were plainly given.

[22] The employment relationship problem is not one that HNS should bear any legal responsibility for resolving and no orders are therefore made against the employer.

[23] When he left Mr Simonovski took with him copies of some of HNS's financial reports including 'Suppliers Invoices Approved'. Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000, I order that the information in these documents is not to be published or disclosed by Mr Simonovski to anyone else. The documents may be retrieved by HNS from the Authority's file on which they have been placed.

[24] Costs are reserved. If the parties are unable to resolve the question themselves an application may be made in writing to the Authority.

A Dumbleton
Member of Employment Relations Authority