

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Reg Phillips (Applicant)
AND iTAG Ltd (Respondent)
REPRESENTATIVES Ian Thompson, Advocate for Applicant
Penny Shaw, Advocate for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING Christchurch 22 June 2006
Submissions received 6 July 2006, 17 July 2006
DATE OF DETERMINATION 24 October 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Phillips began his employment with the respondent as Area Manager for Christchurch and Canterbury on 4 July 2005. The respondent company produces a visitor's guide and operates its business in the tourism sector. The applicant claims that in the course of his employment he was subjected to actions by the respondent which constitute unjustifiable disadvantage and that he was unjustifiably dismissed on 20 September 2005. The applicant sought reimbursement of lost remuneration, \$15,000 for hurt and humiliation and costs.

[2] The respondent denies it acted in a manner which unjustifiably disadvantaged Mr Phillips and denies it dismissed him. The respondent says that the applicant resigned his position and was paid four week's notice in lieu of working the notice period out.

[3] Attempts to resolve the problem at mediation were unsuccessful.

What caused the problem?

[4] The employment relationship was governed by an individual employment agreement, the relevant section being section 5. It reads:

Hours of work are from 8.30 am – 5.30 pm Monday to Friday. From time to time additional hours will be required outside of normal working hours, remuneration for these hours is included in the salary as laid out in clause 4. If weekend days are required to be worked then equivalent week days will be substituted.

[5] The applicant says that in mid-August Mr Turner, the respondent's Managing Director, asked him to work until 6 pm on week days as this was a peak sales period. Mr Phillips agreed to this

request. The sales period ended on 8 September 2005 and the applicant says that at a meeting on Friday, 16 September he was asked to work until 6 pm and the following Saturday to attend to proofing and production requirements. He says he asked Mr Turner if the extended hours would continue and was told they would during the distribution phase. Mr Phillips says that he objected that the extent of the overtime was never explained at interview and was causing him some difficulties as he had a young family of four children.

[6] Following the meeting the applicant telephoned his wife to check on commitments they had in the following week and the weekend. After checking with his wife, Mr Phillips told Mr Turner that he was unable to work extended hours for most of the following week and weekend given the family's commitments and the late notice of the overtime requirement. Mr Turner said that overtime was a requirement under the employment agreement and the refusal would put the applicant on *thin ice*. Mr Phillips said he would get some advice and talk with Mr Turner on the Monday.

[7] On Monday, 19 September Mr Phillips asked Mr Turner if he could have a meeting with him to discuss the issue. The applicant says he informed Mr Turner that he was going to take a personal grievance against him on two grounds, the first being that Mr Turner had not dealt with the applicant in good faith in terms of the hours each week he was expected to work. He says he told Mr Turner that the company's expectation was very different to his own and that this had caused a major rift in the working relationship. The second ground the applicant says he raised with Mr Turner was that the company had not dealt in good faith with him by suggesting that he would receive a bonus upon reaching a specified target when, for a range of reasons, that target was not achievable. Mr Phillips says he told Mr Turner that he felt that the relationship had broken down to the point where he did not feel comfortable working with Mr Turner or for his company. Mr Phillips says that he then proposed they could come to a gentleman's agreement whereby he would not take any further action on the personal grievances but would not work the extended hours and weekends that Mr Turner required. He said that he would begin looking for a new job and advise Mr Turner how that was progressing so that Mr Turner could manage the situation of hiring a new Area Manager. Mr Phillips says that he expressed the hope that the pair would part company on good terms and avoid any third party involvement.

[8] The applicant says that Mr Turner said he did not feel that the relationship had broken down to the extent described and felt that the pair could still work together. Mr Phillips says that he told Mr Turner that for his part that was not going to happen, but gave him an assurance that he would continue to work hard in the interests of the company. He says that Mr Turner appeared *fairly comfortable with this and asked me to put it in writing*.

[9] Later that day Mr Turner approached the applicant's desk and placed a document in front of Mr Phillips. The applicant says that the document contained several pages of allegations of inappropriate behaviour by the applicant.

[10] Mr Turner says that in August he had developed some concerns over Mr Phillips' failure to complete the company area spreadsheets in a timely manner. He says he raised this concern with the applicant verbally but that Mr Phillips became aggressive so in a letter to the applicant dated 26 August 2005 Mr Turner raised his concern about the above matter, the likelihood of not reaching the sales targets and about the way in which informal attempts to remedy these problems was greeted by the applicant. Mr Turner says he presented the letter to Mr Phillips after discussing these concerns with him.

[11] When Mr Turner asked the applicant at a meeting on 16 September to detail progress on clients who were slow in providing information Mr Phillips, says Mr Turner, became *agitated and aggressive*. Mr Turner says he raised the need for the applicant to work on the following Saturday morning to check proofs and was told that Mr Phillips would need a month's notice to work a

Saturday. Mr Turner says he telephoned the applicant at 5.45 pm that day to advise that he wanted to meet Mr Phillips on the following Tuesday to discuss this issue, that the matter could involve disciplinary action and that Mr Phillips could bring a representative to the meeting. Finally, Mr Turner told the applicant he would give him a letter on the Monday setting out the company's concerns.

[12] On the Monday the applicant went to Mr Turner's office and advised that he was bringing a representative to the meeting and that he intended proceeding with grievance action against the company. Mr Turner says Mr Phillips told him he did not want to work with the company any more and would seek new employment as soon as possible. Significantly, Mr Turner said, *I did not consider this to be a resignation and thought the situation was still recoverable. I told Reg that I thought we could still work together.*

[13] Later that morning Mr Turner says he handed the applicant the letter referred to in the telephone conversation of Friday, 16 September.

[14] On Tuesday, 20 September Mr Turner says Mr Phillips approached him shortly after arriving at work and told him that he was going to lodge a complaint with the Police over an email Mr Turner had shown the applicant soon after he began his employment. Mr Phillips said the email was pornographic but Mr Turner's view was that it was *pretty harmless* depicting topless women. Mr Turner says that in spite of expressing no objection to the email at the time he was shown it, Mr Phillips left Mr Turner's office and rang the Police.

[15] At 9.30 am Mr and Mrs Turner met with the applicant who confirmed he had decided not to have representation at the meeting. Mr Turner says he went through the letter point by point asking the applicant for his responses. He says the applicant simply replied *no comment* to each issue raised.

[16] Mr Turner asked Mr Phillips if he still intended to leave the company. The applicant says that he stated that that was his intention as he had explained the previous day, together with the proposition that they would work together on that matter. The applicant says that Mr Turner asked him to leave his office saying that he wished to make a phone call. Some 20 minutes later Mr Turner called the applicant back into his office and Mrs Turner was still present. The applicant says that Mr Turner told him that since he had made it clear that he intended to leave the company he was taking that statement as the applicant's resignation. Mr Turner stated he would pay the applicant four week's notice and the applicant was to leave immediately.

The issues

[17] The Authority is required to determine the following issues:

- Was the employer entitled to require the applicant to work overtime, and if so, to what extent?; and
- What was the nature of the agreement made between the applicant and Mr Turner on 19 September?; and
- Was the applicant's statement to Mr Turner that he wished to leave as soon as possible capable of amounting to a resignation?; and
- Were the events of 20 September sufficient to nullify the arrangement made between the parties the previous day?; and

- If the applicant succeeds what, if any, remedies are due to him?; and
- Did the applicant contribute in any significant degree to the dismissal?

The investigation meeting

[18] The Authority was assisted by the applicant, his wife, Sacha de Bazin, and a past employee Dallis Parker, who gave evidence in support of the claim. I heard evidence from Mr and Mrs Turner and Sally Bertie on behalf of the respondent. The Authority received a signed statement from David Gore on behalf of the applicant. Mr Gore intended to be at the investigation meeting but was unable to attend.

[19] An affidavit from Rohan McDonald, the applicant's predecessor in the role, was received on 2 August 2006. Mr McDonald had provided a statement of evidence but was unable to be present due to flight disruptions. His affidavit is identical to his filed statement and it confirms Mr Turner's evidence that Mr Phillips was clearly advised of the need for extra hours and some weekend work at the time of interview. I thank all for their participation and their input.

Analysis and discussion

[20] In completing the investigation into the events surrounding the dismissal of Mr Phillips the Authority has been assisted by the record of the meetings held on 19 and 20 September 2005 made by Mrs Turner. While not a verbatim record, they throw considerable light on what occurred at those meetings.

[21] I have come to the view that on 19 September Mr Turner did not regard Mr Phillips' statement that he intended to leave the company once he had found alternative employment as a resignation. Indeed, Mr Turner said he did not believe the employment relationship was beyond redemption. I accept that at that point the pair had come to an interim arrangement pending Mr Phillips putting his proposal in writing for Mr Turner's consideration.

[22] In the first meeting on 20 September matters went seriously awry. Mr Turner put a range of concerns he had to the applicant who declined to respond to any of them. Mr Turner became frustrated by the repetitive *no comment* from Mr Phillips and adjourned the meeting to consider the situation and to take some advice.

[23] In the meeting which followed later in the morning Mr Turner's position had clearly changed. Having chosen not to regard the applicant's statement on 19 September that he intended to leave the company upon finding other employment as a resignation, Mr Turner on the morning of the 20th decides that the statement does constitute a resignation.

[24] The behaviour of the applicant on the morning of 20 September was extraordinary in the circumstances in that having put a proposal to his employer regarding what I will call a *managed exit* on 19 September, the following morning he rings the Police regarding Mr Turner's showing him an email he then said he found offensive, and advises both Mr and Mrs Turner that he will be making a complaint against both of them to the Police depending on the advice the Police give him. While I accept that Mr Turner took professional advice on the position which may have influenced his decision, I am also firmly of the view that the applicant's behaviour on that morning and his reiterating his intention to leave as soon as possible caused Mr Turner considerable frustration and possibly bewilderment.

[25] Ms Shaw submits that the relevant principle in this case is that set out in *Boobyer v GoodHealth Whanganui*, WEC3/94 (unreported) citing *Sadd v Iwi Transition Agency* [1991] 1 ERNZ 438. It is, submits Ms Shaw, a situation *in which an employee is against his or her will treated as having resigned*. Ms Shaw further submits that Mr Phillips' communication was *equivocal and the employer misunderstood it as a resignation contrary to the employee's intention, but did nothing within a reasonable time to correct the employer's false impression*.

[26] Mr Thompson submits the situation parallels that in *NZPSA v Landcorp Ltd* [1991] 1 ERNZ 741 and also cited in *Boobyer* (supra) where *an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so*.

[27] On reflection, there are elements of both in the instant case, yet it was only in the light of the events on 20 September that Mr Turner construed the applicant's statement as a resignation and had him leave the respondent's premises. There was no evidence from the applicant that he remonstrated with Mr Turner at that time, or sought to change Mr Turner's perception of his statement.

The determination

[28] Returning to the issues as set out above:

- I find that under the terms of the individual employment agreement the employer was entitled to require the applicant to work overtime and that this issue was discussed at the pre-employment stage. Mr McDonald's evidence confirms my view on this issue. What appears not to have been discussed was any agreed notice to be given to the applicant if he was required to work overtime.
- I find the arrangement reached between Mr Turner and Mr Phillips on 19 October 2005 was that Mr Phillips would put his proposal for a *managed exit* from the respondent company in writing for Mr Turner's consideration. I think it fair to say that the status quo in respect of the employment relationship would remain until such time as Mr Phillips' proposal had been reduced to writing and Mr Turner had had the opportunity to consider it.
- I find the statement by the applicant to Mr Turner that he wanted to leave his employment as soon as possible was not, in all the circumstances, capable of amounting to a resignation.
- I find that while the behaviour of the applicant was decidedly unusual given his proposal regarding a *managed exit* from the employment relationship, that behaviour did not warrant the unilateral abandoning of the proposal by the respondent. Even the repeating of the intention to leave did not entitle Mr Turner to regard it as an actual resignation.
- I find the applicant was unjustifiably dismissed.

[29] Having made these findings I must now turn to the issue of remedies. In addition, I am required to consider the matter of contribution by the applicant.

Remedies

[30] The applicant sought reimbursement for lost remuneration and for the loss of the benefit of the use of the respondent's vehicle in the sum of \$16,692.30 gross, less \$3,005.28 gross earned prior to

securing permanent employment. The applicant also sought \$15,000 in compensation for hurt and humiliation, loss of dignity and injury to feelings, and costs and disbursements.

[31] Mr Phillips was on an annual salary of \$50,000 when employed by the respondent. It was 14 weeks from the time of his dismissal until he was able to find work in keeping with his skills and experience, but undertook manual work while looking for that employment. In remuneration terms the applicant's weekly loss was \$961.54 gross which when multiplied by 14 weeks results in \$13,411.56 gross. From that is to be subtracted the \$3,005.28 gross earned during that period. I calculate the applicant's remuneration loss at \$10,456.28 gross.

[32] The loss of a benefit is covered by section 123(1)(c)(ii) of the Act. The applicant submits that the value of the use of the company vehicle was \$12,000 per annum in salary terms. I accept that submission. Based on a loss of \$230.77 per week, I calculate his loss of benefit over 14 weeks at \$3,230.78.

[33] Turning to Mr Phillips' claim under section 123(1)(c)(i) I have reflected on the evidence of detriment suffered by the applicant and have weighed that with the relatively short period of employment with the respondent which was some 11 weeks. In all the circumstances I think it just to award him the sum of \$6,000 under this head of his claim.

Contribution

[34] Having found for the applicant the Authority is required by section 124 to consider the extent to which the applicant's actions contributed to the situation which gave rise to the grievance.

[35] In this I have considered the applicant's reaction to receiving the letter of 19 September setting out the respondent's concerns, in particular his brandishing it at Mrs Turner while referring to the letter as *nonsense*. I also considered Mr Phillips raising with Mrs Turner the email incident of some weeks previous and his threat to publicise it within the tourist industry.

[36] I have also weighed the applicant's refusal to engage Mr Turner and to respond to any of the concerns he raised during the first meeting on 20 September. The respondent was entitled to raise issues particularly as earlier informal attempts seemed unsuccessful. The refusal of Mr Phillips to put his points of view or explanations, including an explanation for his telephoning the Police that morning over the email, inflamed the situation unnecessarily. I find that this provoked an unfortunate yet understandable reaction from Mr Turner whose view prior to the meeting was that the relationship was salvageable.

[37] After weighing the applicant's behaviour in the balance I evaluate his contribution at one-third and order that the remedies awarded above be reduced by that amount.

Summary

[38] The respondent is to pay the applicant the following:

- (i) Under section 123(1)(b) the sum of \$6,974.34 gross; and
- (ii) Under section 123(1)(c)(i) the compensatory sum of \$4,000 without deduction; and
- (iii) Pursuant to section 123(1)(c)(ii) the compensatory sum of \$2,154.93 without deduction.

Costs

[39] Costs are reserved. If the parties are unable to agree on costs leave is reserved to have the Authority determine the issue.

Paul Montgomery
Member of Employment Relations Authority