

[3] A statement in reply was lodged on behalf of the first respondent on 5 November 2008. The company took no issue with the identity of Mr Speed's employer.

[4] Hyro New Zealand Ltd claimed that Mr Speed's dismissal was justified for performance reasons.

[5] Before mediation could take place, on 13 February 2009 the first respondent company was placed into liquidation.

[6] An amended statement of problem was lodged on 25 February 2009 adding the second respondent Hyro Services Pty Limited as an employer party. Mr Speed alleged that he had been employed (and unjustifiably dismissed) by the second respondent, or by the first and second respondents jointly.

[7] The second respondent is registered in New Zealand as an overseas company and has a New Zealand address for service recorded in the files of the Companies Office. It has the same two directors as the first respondent had prior to liquidation.

[8] Although neither the second or the first respondent lodged any statement replying to the amended claim, an email was received by the Authority from Ms Bridee Clifton, the second respondent's Director of Human Resources, which stated:

For everyone's reference, we maintain the stance that this matter will be handled with the liquidator as Andy Speed was employed by Hyro NZ and not Hyro Services and we have contracts and pay slips and numerous other documentation to support this. I will not provide any further information as this matter should be dealt with by the receiver as stated in my original email regarding this matter.

[9] Following this communication Hyro Services took no further part in the investigation, including the investigation meeting held 13 May 2008. The liquidation of the first respondent explained the non-participation of that party, but the second respondent although given an opportunity to take part in the usual telephone conference with the Authority as part of the management of the case, did not do so.

[10] I am satisfied that the second respondent was also served with a formal notice of the investigation meeting. Proof the notice was delivered on 3 April 2009 was obtained by the Authority before it proceeded with the meeting, as permitted under the Employment Relations Authority Regulations 2000.

[11] The principal issues for investigation by the Authority have been the identity of Mr Speed's employer or employers and the justification for his dismissal. Mr Speed was examined on his claims by the Authority and by counsel, Mr Sissons.

Identity of employer

[12] The Authority is satisfied that both Hyro New Zealand Limited (In Liquidation) and Hyro Services Pty Limited were, contemporaneously, the employers of Mr Speed at material times. Therefore although proceedings cannot be continued against the former company because of its liquidation, they are able to proceed against the latter and it can be required to answer for the claim by Mr Speed that he was unjustifiably dismissed.

[13] Documents, many of which were supplied by Ms Clifton as part of the first respondent's statement in reply, and answers to questions given by Mr Speed in his evidence, satisfy the Authority that the second respondent was also an employer of Mr Speed.

[14] He told the Authority he had had some concerns about where he stood in relation to the two respondents, because both were referred to in written material including his employment offer letter and an employment agreement. His particular concern was the line of reporting in his role since, although he was based in the first respondent's Auckland office, those who were supervising him were in the second respondent's Sydney office. When he questioned that situation he was told he was employed by "*Hyro*."

[15] I accept that Mr Speed was led to believe that the two companies were, for all purposes, one and the same organisation. The second was the parent of the first and they had the same directors. I accept that the first respondent had been incorporated in New Zealand for normal commercial purposes, to facilitate the second respondent's business being performed in this country. It appears that funds from the second respondent were transferred from Australia to New Zealand and paid in New Zealand currency to Mr Speed as salary. Although there were at times up to 20 persons employed in the first respondent's Auckland office, Mr Speed reported directly to a supervisor based in the Sydney office of the second respondent.

[16] The contracting employer parties with Mr Speed are clearly identifiable from two documents; an offer letter and an agreement. They came into existence at the

very beginning of Mr Speed's employment and are therefore more reliably identify the parties' intentions than other documents which were generated at the time of his dismissal.

The offer letter

[17] After Mr Speed was interviewed in about November 2007, he was sent a letter under the second respondent's letterhead containing an offer of employment. It stated:

I am pleased to advise that following your recent discussion with Rochelle Chapman, Hyro Services Pty Limited (Hyro), a member of the Hyro Limited group of companies, is offering you the position of business development manager.

[18] The letter confirmed the start date of the employment with the second respondent as 1 August 2007 and then listed "*terms of this offer.*" They included remuneration of \$100,000 per annum, participation in the "*Hyro Limited employee performance option programme,*" bonus and commission payments, and benefits including four weeks paid annual leave and up to two weeks paid sick leave per annum.

[19] A reporting structure outlined in the offer letter placed as his supervisor Mr Chris Flintoft, who was Sydney based. The letter outlined a three month probationary period at the end of which there would be a formal review, and thereafter Mr Speed was to be subject to annual performance reviews. The offer letter was written by Ms Bridee Clifton as Human Resources Manager. Mr Speed was asked to acknowledge his acceptance of the offer by signing the letter and returning it to Ms Clifton, which he did.

The agreement

[20] At about the same time he accepted the written offer made in the name of the second respondent, Mr Speed received an employment agreement in the name of the first respondent. That company was described as "*the employer.*" This was a typical employment agreement containing terms and conditions normally found in such an agreement. None of them were inconsistent with the terms set out in the offer letter, and the same three month probationary period was to apply.

[21] Clause 26 of the agreement provided for the governing law of the agreement to be New Zealand law. A curious provision in the agreement was a requirement for Mr Speed to comply with the Insider Trading Rules of the Australian Stock Exchange. The need for this may have arisen if the employer was an ASX-listed company, such as the second respondent. Another provision refers to the Australian Commonwealth Copyright Act 1968, also suggesting some involvement by an Australian company, such as the second respondent, in the employment of Mr Speed.

[22] Mr Speed signed the employment agreement and returned it.

Other documents

[23] A termination payment calculation in writing is headed "*Hyro NZ Limited*" and a letter confirming Mr Speed's dismissal also refers to his "*employment with Hyro NZ Limited.*" The latter, which was signed by Ms Clifton, was written under the letterhead of the second respondent.

[24] After his employment was terminated Mr Speed was required to sign a Deed of Release document. Although the employer is identified as "*Hyro NZ Pty Limited,*" which is a non-existent entity, a CRN number links it to the New Zealand registered first respondent company.

[25] A certificate of service given to Mr Speed refers to him being employed by Hyro New Zealand Limited between 1 August 2007 and 15 August 2008. This letter too is written on Hyro Services Pty Limited letterhead.

[26] Mr Speed's business card simply showed the logo of Hyro but described him as the "*Business Development Manager,*" the same title referred to in both the offer letter and the agreement.

[27] A further document Mr Speed was required to execute related to confidential information, copyright and invention. It was expressed to be in consideration of his employment by the second respondent. I accept the evidence of Mr Speed that he signed this agreement and returned it to Hyro management, either in the Sydney office, when he visited shortly after commencing employment, or the Auckland office.

[28] I find that acceptance of the offer of employment formally made by the second respondent, Hyro Services Pty Limited, formed an employment relationship between that company and Mr Speed. I find also that Mr Speed's execution of the employment agreement under the name of the first respondent Hyro NZ Limited did not expressly or implicitly extinguish the agreement that had been formed at about the same time with the second respondent.

[29] I find therefore that contemporaneously there were two employment relationships, one between Mr Speed and the first respondent and the other with the second respondent.

[30] There is nothing contrary to legal principle about that situation, one recognised by the Labour Court in *Inspector of Awards & Agreements v. Pacific Helmets Ltd* [1988] NZILR 411. The Court held that in principle there was nothing preventing;

... two people or firms joining together to employ one man for their respective purposes. And the more so when these purposes are closely associated. How they allocate wages, etc between themselves is their business.

[31] The two respondent companies were closely associated within the group or organisation known as Hyro.

[32] It follows that Hyro Services Pty Limited is properly able to be challenged by Mr Speed to show justification for his dismissal.

Justification for dismissal

[33] The Authority is satisfied from the evidence of Mr Speed that his dismissal on 15 August 2008 cannot be justified by the second respondent company.

[34] The day before he was dismissed Mr Speed was rung up by the company's general manager Mr Dan Swan from Australia where he was based. Mr Swan raised concerns about Mr Speed's performance and in particular alleged a failure to bill or invoice contracts Mr Speed had secured in his role as Business Development Manager.

[35] Mr Speed was asked to respond to the concerns, which I accept had not been raised at any time before during the 12 months of his employment, particularly in a disciplinary context.

[36] Mr Speed advised Mr Swan that he was shocked by the allegations made about his performance but would try to explain what he had done. In doing so he criticised Hyro management for amongst other things not providing sufficient support, communication, strategy, direction, structure, feedback and resources. He also explained that he had been distracted by a personal issue, his partner's pregnancy and the impending birth of their child in a few weeks time.

[37] Following their discussion Mr Swan and Mr Speed agreed to speak by phone again next morning on 15 August. Mr Speed provided documentary information relating to his performance on particular contracts, as requested.

[38] Shortly after the next telephone conference had begun on 15 August, Mr Swan advised Mr Speed that he was not generating enough revenue due to his lack of performance and that "*unfortunately this meant that [Mr Speed's] employment with Hyro would be terminated as of that date.*" That Mr Swan had dismissed Mr Speed then was confirmed by Ms Clifton in her account provided as part of the first respondent's statement in reply.

[39] Mr Speed largely agrees with Ms Clifton's account of the two telephone discussions on 14 and 15 August.

[40] Mr Speed was offered placement services at the expense of his employers and he was required to sign a deed of release. That form of release may be appropriate in other jurisdictions but could not operate in New Zealand to prevent Mr Speed or any employee invoking the personal grievance remedy under the Employment Relations Act 2000, which may not be contracted out of.

[41] Mr Speed told the Authority that his humiliation was increased by the requirement to sign this particular release before he could receive payment due for final pay, pay in lieu of notice, holiday pay and other statutory entitlements.

[42] Mr Speed had not had a formal performance review during his employment, although he would not have been due for one under the terms of employment until about November 2008. He had not been subjected to any regime of performance management, and his employers could not have been dissatisfied with him as in June 2008 his base annual salary had been increased from \$100,000 to \$120,000. At the same time he was given a sales incentive plan providing his annual gross profit target

as \$800,000. Mr Speed agreed with the plan and signed the document accompanying it on 9 June 2008, barely two months before he was dismissed by Mr Swan.

[43] About a month before his dismissal, Mr Speed was advised of a change in the reporting structure under which Mr Swan had replaced Mr Flintoff as his immediate supervisor.

[44] I agree with submissions made by Mr Sissons that the principles discussed by Chief Judge Goddard in *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 are applicable to the circumstances of this case, particularly with regard to the procedural steps that must be followed in New Zealand by an employer when considering dismissing an employee for unsatisfactory performance. As set out in the decision, the employer's adherence to those principles may be examined through a series of questions:

- (a) *Did the employer in fact become dissatisfied with the employee's performance?*
- (b) *Did the employer inform the employee of the dissatisfaction and set out the expected standard?*
- (c) *Were the criticisms and future requirements objective and readily comprehensible by the employee?*
- (d) *Was reasonable time allowed for the attainment of the required standards?*
- (e) *After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:*
 - (i) *using an objective assessment of measurable targets;*
 - (ii) *giving the employee an opportunity to answer the conclusions arising from the trial period;*
 - (iii) *listening to the employee's explanation with an open mind;*
 - (iv) *considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;*
 - (v) *exhausting all possible remedial steps such as training, counselling and redeployment?*

[45] These requirements found in the *Trotter* decision were not applied in that case to a relatively junior employee who was not part of management, but were for a senior executive of a large corporate. They are equally applicable to an employee at the level and seniority of Mr Speed.

[46] The Authority determines that a fair and reasonable employer would have followed most if not all of the steps outlined in the *Trotter* case, so that although

dismissal could still have been the end result, Mr Speed was entitled to have a fair trial of his performance. A fair trial is likely to have extended over several weeks if not months and would not have led to a decision being made to dismiss him in the space of a few hours following two relatively brief telephone conferences, of which there was no warning as to what they were going to be about.

[47] I am quite satisfied that after first drawing attention to performance concerns with Mr Speed on 14 August, a fair and reasonable employer would then have implemented measures of the sort described in the *Trotter* case, before deciding to take disciplinary action including dismissal. It was also unfair and unreasonable for Mr Speed to have been given a new budget part way through the year, instead of before it had commenced, and to have then expected him to meet it.

Determination

[48] For the above reasons the Authority determines that the dismissal of Mr Speed by the second respondent Hyro Services Pty Ltd was unjustified. Applying the test of s 103A of the Employment Relations Act 2000, I find that what the employer did and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[49] I find that no reduction under s 124 of the Act in the remedies to be given to Mr Speed for his unjustified dismissal is required for any contributory fault or blame on his part. He had not been warned previously about alleged failings in his performance and it seems that several of the matters he put forward by way of explanation were not fully or properly considered by his employers.

[50] Mr Speed claims for lost remuneration in the period up to and beyond the investigation meeting of this case. To the date of the meeting, his net loss after earnings have been taken into account is \$55,407.38. He claims a further prospective loss of earnings for 12 weeks, or \$27,696.60.

[51] I am satisfied that Mr Speed made reasonable attempts to mitigate his loss by applying for many jobs. He has had some temporary work but has not been successful in obtaining permanent employment, so far.

[52] I consider this to be a case where the calculation of loss should justly extend beyond the three month period provided by s 128(2) of the Act. But to reimburse for

loss for a total period of nearly a year, or 47 weeks, as sought, would take no account of possible future occurrences, such as the chance that after a fair trial Mr Speed was not able to meet reasonable performance targets and as a consequence was dismissed justifiably. Under current economic conditions redundancy is another such possible development adversely affecting the continuation of the employment in the longer term.

[53] I consider that the period of loss should be seven months from the date of dismissal, while allowing for the four weeks paid to Mr Speed in lieu of notice and his earnings in that period. From employment with Snakk Media those earnings were \$28,735.13, which deducted from 26 weeks remuneration (at \$2,308.05 per week) leaves \$31,274.17. The second respondent is ordered to pay that amount to Mr Speed under s 128 of the Act.

[54] I am satisfied also that Mr Speed suffered considerable hurt feelings, humiliation, anxiety and distress as a result of his abrupt dismissal carried out without regard to the requirements of fairness and reasonableness in the circumstances. He was particularly concerned about his reputation in his field of employment after having been dismissed in such a way and also the immediate implications for his family of his loss of job and remuneration, in circumstances where his partner was expecting their child in a few weeks, as Mr Swan was well aware. Mr Speed was also at the time under further strain because of the diagnosis of a potentially fatal illness suffered by his son.

[55] Mr Speed seeks \$40,000, an award well outside the range settled by the Court of Appeal. I fix \$17,000 as the amount to be paid by the second respondent to Mr Speed for the harm caused to him, under s 123(1)(c)(i) of the Act.

[56] Costs are reserved. Mr Sissons may apply in writing for an order within three weeks of the date of this determination. A copy of any application will be sent to the second respondent which shall have two further weeks to make any reply.

A Dumbleton
Member of the Employment Relations Authority

