

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 221  
5427519**

BETWEEN

THOMAS O'DONOGHUE  
Applicant

AND

ADDCOM CONTACT  
SOLUTIONS LP (formerly known  
as ABTC GROUP LP)  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Vinnicombe, Advocate for Applicant  
Keith Thomason for Respondent

Investigation Meeting: 17 April and 30 May 2014 at Auckland

Submissions received: 30 May 2014 from Applicant and from Respondent

Determination: 6 June 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Thomas O'Donoghue, claims that he was unjustifiably dismissed by the Respondent, Addcom Contact Solutions LP (Addcom) on or about July 2013.

[2] Addcom denies that Mr O'Donoghue was unjustifiably dismissed and claims that he was justifiably dismissed for failing to meet his sales targets.

**Issue**

[3] The issue for determination is whether or not Mr O'Donoghue was unjustifiably dismissed by Addcom.

[4] The Investigation Meeting held on 17 April 2014 had proceeded in the absence of Mr Keith Thomason, Managing Director, pursuant to clause 12 of Schedule 2 of the Act. However notification of his inability to attend due to illness was received from Mr Thomason shortly after the Investigation Meeting had commenced, and it was accordingly postponed until 30 May 2014

## **Background Facts**

[5] Addcom is a telecommunications company holding distribution rights for a number of products. The parent company is based in Australia and the New Zealand subsidiary has approximately 7 employees. Addcom was formerly known as ABTC Group LP until the name was changed to Addcom Contact Solutions LP with effect from 22 August 2013.

[6] Mr O'Donoghue was employed as a Sales and Product Specialist on 31 January 2013. Mr Keith Thomason, Managing Director, said that Addcom had acquired the distribution rights in New Zealand to the Zultys product range, and as a result it had approached and employed Mr O'Donoghue, who had previous experience of the Zultys brand of products.

[7] Mr O'Donoghue was provided with an individual employment agreement (the Employment Agreement) which he signed on 13 January 2013. This set out at clause 49 that it: *"... may only be amended or varied by written consent signed by both parties, or as identified elsewhere in this Agreement."*

[8] In accordance with Schedule 1 of the Employment Agreement, Mr Thomas was remunerated according to a salary package stated to be a total remuneration package of \$60,000.00 per annum inclusive of his base salary, excluding a company car, but including payment for all hours worked, annual leave loading and any other benefits.

[9] In addition Mr O'Donoghue was entitled to a commission component (from -5%) based on him achieving a 35% profit margin against a sliding scale of actual sales made. His on target earnings (said to include commission, company vehicle, salary, fuel and cell phone) were estimated to be \$96,600.00. Mr Thomason said that from the outset of his employment, Mr O'Donoghue's monthly sales target had been set at \$60,000.00 per month.

[10] Mr Thomason said that Mr O'Donoghue reported to Mr William Thomason, Sales Manager, who had taken Mr O'Donoghue through Addcom's full portfolio of product, training had also been provided via webinars, and he had personally arranged client visits and introduced Mr O'Donoghue to existing clients which included Telecom and Telecom resellers.

[11] He also explained that pricing for the Zultys system was obtained via the manufacturers recommendations; however the manufacturer had agreed some flexibility with the pricing in the New Zealand market.

[12] Mr O'Donoghue agreed that there was flexibility on pricing, however he had encountered a problem from the outset in selling the Zultys product range as the potential re-sellers had to pay a fee for the training on the product range provided by Addcom.

[13] Mr Thomason explained that the re-sellers did not pay for the training which Addcom provided, however they did have to purchase demonstration stock.

[14] Mr Thomason said that there were weekly sales meetings which Mr O'Donoghue attended. During these meetings Mr Thomason provided the sales achieved to date that month, sales information by individual, and also the potential pipeline, information which was needed by Addcom for their cash flow projections.

*Meeting 9 April 2013*

[15] Mr Thomason said that during the first 3 months of his employment Mr O'Donoghue had not achieved any sales. As a result he and Mr William Thomason had met with him following the weekly sales meeting on 9 April 2013.

[16] Mr Thomason said that during the meeting they had discussed Mr O'Donoghue's performance and what was expected of him, including his being required to make more appointments, sales calls and obtain more sales.

[17] Mr Thomason said that the potential ramifications has been explained to Mr O'Donoghue, being that Addcom would be looking closely at the sales he achieved during April 2013 and that if he did not meet the sales expectations, his position would be reviewed at the end of the month. Mr Thomason said that they had taken Mr O'Donoghue's feedback, and had asked him what help could be provided to him.

[18] Mr O'Donoghue said that he did not specifically recall the 9 April 2013 meeting, stating that there had been multiple meetings, and during these meetings more information had been provided to him with further discussion taking place.

[19] Mr Thomason said that after the meeting on 9 April 2013 he had accompanied Mr O'Donoghue on some customer visits and observed his sales presentations, offering subsequent feedback.

*Meeting 7 May 2013*

[20] Mr Thomason said that he and Mr William Thomason had met with Mr O'Donoghue on 7 May 2013 as there had not been an improvement in his sales performance.

[21] Mr Thomason said that following the sales meeting, as Mr O'Donoghue had mentioned that he did not have a large enough customer base, he had expanded his sales

territory by including Hamilton, Whangarei, Tauranga and an additional 134 corporate clients in Auckland.

[22] Mr O'Donoghue said he did not recall the 7 May 2013 meeting, but confirmed at the Investigation Meeting that he had been assigned an additional number of accounts, however there had been little or no previous contact by Addcom with these customers.

[23] He stated that he had set up meetings with these additional customer contacts; however he had not been able to convert any of these new leads into sales.

*Meeting 28 May 2013*

[24] Mr Thomason said that during a meeting held on 28 May 2013, because Mr O'Donoghue had not been achieving his sales target, consideration had been given to reducing the sales target structure to achieve \$15,000.00 in June, \$25,000.00 in July, and \$35,000.00 in August 2013.

[25] Mr Thomason said Mr O'Donoghue had also been given a choice of the termination of his employment, or taking a reduction in his base salary from \$60,000.00 p.a. to \$50,000.00 p.a. Mr Thomason said Mr O'Donoghue had agreed to the salary reduction proposal.

[26] Mr O'Donoghue said the meeting on 28 May 2013 had been a short meeting held at the end of the weekly sales meeting. The fact that his performance had not been meeting expectations had not come as a surprise to him since he had been aware that sales not had been forthcoming, a fact he attributed to the re-sellers resistance to fee expectations rather than to any lack of diligent appliance on his behalf.

[27] Mr O'Donoghue recalled the reduction of his salary being proposed at the meeting, however denied that he had agreed to it.

[28] Following the meeting Mr Thomason sent Mr O'Donoghue an email dated 29 May 2013 which confirmed the revised sales targets, and which stated: "*Your salary of \$50,000.00 will be reflected in the next pay cycle*".

[29] On 1 June 2013 Mr Thomason was overseas due to personal circumstances.

[30] On 17 June 2013 Mr William Thomason sent an email to Mr O'Donoghue stating:

*As per our meeting this morning about your sales results over the past 5 months.*

*As we discussed the monthly sales targets that have been put in place are not being achieved.*

*As we agreed today in our meeting. The target we agreed on this month is to be 15k, next month 25k then 35k.*

*If we do not see these results we will need to review your position at ABTC.*

[31] Mr O'Donoghue said he recalled receiving the email dated 17 June 2013. He said there had been no discussion with him following the meeting on 28 May 2013; however he confirmed at the Investigation Meeting that he had been provided with sales information about how he was tracking towards his sales target.

[32] During the period Mr O'Donoghue said that he had achieved some significant sales orders, however he said that his progress regarding sales had not been as positive as he had hoped.

*Meeting 25 June 2013*

[33] Mr Thomason returned to work on 24 June 2013. After he had reviewed the sales figures, he had asked Mr O'Donoghue to remain behind after the weekly sales meeting on 25 June 2013.

[34] During the meeting, Mr Thomason said he had examined the sales performance with Mr O'Donoghue and checked with him about any potential sales orders in the pipeline. He said that he had advised Mr O'Donoghue that head office in Australia was looking seriously at his performance, and had made him fully aware that his employment would not continue unless he achieved the sales targets.

[35] However there is no evidence presented to the Authority that Mr Thomason had indicated to Mr O'Donoghue that his employment would cease at the end of June 2013 unless he achieved the sales target for that month.

[36] Mr O'Donoghue said he recalled the meeting in June 2013 with Mr Thomason and the discussion about his sales targets. Whilst he had been concerned at the situation, he had believed that he still had time to achieve the remaining sales target amount and thereby achieve the sales target for the month of June 2013, based on the sales information to which he had access in 'Sugar CRM', a customer relationship management system.

[37] Mr O'Donoghue said that at no time had either Mr Thomason or Mr William Thomson told him his job was in jeopardy at any time, or that his employment would be terminated unless he achieved the sales target in June 2013.

*Events post – 25 June 2013 meeting*

[38] On Thursday 27 June 2013 Mr Thomason said he had a discussion with Addcom's CEO based in Australia regarding Mr O'Donoghue's sales performance in June.

[39] At that stage it appeared unlikely that Mr O'Donoghue would achieve his sales target for June 2013 by the last business day, 28 June 2013, and the decision had been made that unless Mr O'Donoghue achieved the sales target by 28 June 2013, his employment would be terminated.

[40] Although the Sugar CRM system enabled Addcom to assess whether there were any possible sales pending, Mr Thomason said it had been apparent that no leads/quotations would generate the sales required by the end of June 2013.

[41] During the weekend of 29 June 2013 Mr O'Donoghue said that his wife had drawn his attention to the fact that there had been an unexpected payment into their bank account, however he had not realised that this related to the termination of his employment from Addcom.

[42] Mr Thomason said that the decision to terminate Mr O'Donoghue's employment had been made in the late afternoon of 28 June 2013. He had hoped to meet with Mr O'Donoghue that day, however Mr O'Donoghue had not been in the office as expected that day or on Monday 1 July 2013, and he had been unable to contact him over the intervening weekend.

[43] Mr O'Donoghue disputed that he had not been in the office on 28 June 2013, or that Mr Thomason had tried to contact him over the weekend, and stated that he had been out of the office on business on 1 July 2013.

*Meeting on 2 July 2013*

[44] On 2 July 2013 Mr O'Donoghue said he had been asked to attend a meeting with Mr Thomason at which he was presented with a letter signed by Mr Thomason and dated 1 July 2013. The letter stated:

*At our recent meeting on 17/6/2013 we discussed the companies concern that your sales targets were not being achieved.*

*We gave you a sales target for the month of June of \$15k which we felt was very achievable; however this has not been met.*

*ABTC Group regrets to inform you that due to lack of performance your contract with ABTC Group will be terminated on 2/7/2013.*

*All outstanding salary and holiday pay has been paid into your account over the weekend.*

*We wish you all the best of the future.*

[45] Mr O'Donoghue said he had disputed the statement that he had not achieved his sales target for June 2013, and asked for a reconciliation to be carried out as he was satisfied that, based on the information provided by Sugar CRM, he had reached the target.

[46] Mr Thomason explained that the Sugar CRM system showed the GST figures in the sale, whereas the MYOB system used by Addcom to calculate the sales figures did not. He had therefore asked the Addcom accountant to come into the meeting and go through the MYOB sales figures with Mr O'Donoghue.

[47] Mr O'Donoghue said that he had not agreed with the MYOB basis of calculation but Mr Thomason had then informed him that the decision to terminate his employment had been taken out of his hands and was made by the Addcom head office in Australia.

[48] Following the termination of his employment, Addcom had paid Mr O'Donoghue an amount of monies representing the days he had worked prior to 2 July 2013, and the shortfall in his salary following the disputed agreed reduction from \$60,000.00 to \$50,000.00.

[49] On 12 November 2013 Mr O'Donoghue filed a Statement of Problem with the Authority.

### **Determination**

[50] Mr O'Donoghue was dismissed on 2 July 2013. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

#### ***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[51] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Addcom must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[52] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) *... the employer sufficiently investigated the allegations against the employee ...*
- (b) *... the employer raised the concerns that the employer had with the employee ...*
- (c) *...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
- (d) *... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[53] Whilst Addcom may have had concerns about Mr O'Donoghue's performance and wished to see an improvement, it was nonetheless under a duty to deal with him in good faith.

[54] The email from Mr William Thomason dated 17 June 2013 stated that unless Mr O'Donoghue achieved the expected sales targets, his position at ABTC would need to be reviewed.

[55] This email referred to sales targets to be reached during June, July and August 2013, which had been discussed in the meeting held on 28 May 2013, and the review of his sales performance had been mentioned in this context. I find that this fact could reasonably be regarded by Mr O'Donoghue as meaning any review would take place following this 3 month period, namely at the end of August 2013.

[56] Mr O'Donoghue stated that he had not understood from this statement that his position was in danger of being terminated, nor had this been clearly set out for him at any time subsequently by Mr Thomason or Mr William Thomason.

[57] I find that the fair and reasonable employer would have made it very clear to an employee who was not meeting the expected performance targets that the outcome would be the termination of his or her employment, and further that, despite information previously provided to Mr O'Donoghue regarding the expectation of sales targets to be met over a 3 month period ending on 31 August 2013, the continuation of his employment had become dependent solely upon the sales targets in June 2013 being met.

[58] Clause 38 of the Employment Agreement refers to Disciplinary Procedures in general, and Misconduct not amounting to Serious Misconduct. Clause 38.3 refers specifically to performance and states:

*If conduct on the part of the employee relates to concern as to performance, a fair and reasonable opportunity will be given by the Employer to the Employee to improve on such performance to reach a level of performance reasonably acceptable to the Employer.*

[59] I find that whilst the 3 month period may have represented a fair and reasonable opportunity for Mr O'Donoghue to improve his performance, arbitrarily reducing it to one month was not fair and reasonable.

[60] Moreover the decision to terminate Mr O'Donoghue's employment had been made by Addcom's CEO based in Australia without Mr O'Donoghue being given the opportunity to address Addcom's concerns, or having it give his explanations genuine consideration prior to the dismissal decision taking place.

[61] In fact when Mr O'Donoghue tried to discuss the financial information basis on which his sales targets had been based during the meeting held on 2 July 2013, he was informed that the decision had already been made and actioned.

[62] Irrespective of whether or not Mr O'Donoghue had met the expected sales target, I find that the process carried out by Addcom fell far short of the duty of good faith it owed to Mr O'Donoghue, the contractual expectations contained at clause 38.3 of the Employment Agreement, and the procedural fairness expectations, such that it did not constitute a decision a fair and reasonable employer could have made in all the circumstances at the relevant time.

[63] In reaching this finding I have taken into consideration the fact that Addcom is a small employer without the resources often available to a larger employer, and have considered s 103A(5) of the Act which states:

*The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-*

*(a) Minor; and*

*(b) did not result in the employee being treated unfairly.*

[64] However I am satisfied that the defects in the process were more than minor and did result in Mr O'Donoghue being treated unfairly.

[65] I determine that Mr O'Donoghue was unjustifiably dismissed by Addcom.

### **Remedies**

[66] Mr O'Donoghue has been unjustifiably dismissed and he is entitled to remedies.

#### *Lost wages*

[67] Mr O'Donoghue said he had managed to obtain alternative employment after 8 weeks of attempting to find employment. Mr O'Donoghue had received his 4 weeks contractual notice in lieu at the termination of his employment.

[68] I order that Addcom is to pay Mr O'Donoghue the sum of \$4,615.38 gross (calculated as 4 weeks' salary based on \$60,000.00 per annum).

#### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.*

[69] Mr O'Donoghue is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr O'Donoghue suffered hurt and humiliation in addition to financial difficulties which impacted on him and his family.

[70] However I find that whilst the termination of his employment may have been somewhat unexpected, Mr O'Donoghue had been aware that his performance had not been meeting expectations and was subject to review and scrutiny.

[71] I take this into consideration in setting the level of compensation.

[72] I order Addcom pay Mr O'Donoghue the sum of \$3,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

*Contribution*

[73] I have considered the matter of contribution as I am required to do under s124 of the Act. Although Mr O'Donoghue did not fulfil the sales target expectations set for him, there is no evidence that he did not act diligently during the course of his employment. There is to be no reduction in remedies.

**Costs**

[74] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**