



(ii) **\$13,500.00 as compensation for non-economic loss.**

**D. Costs are reserved.**

**Employment Relationship Problem**

[1] Neal Gapes worked as a sales development representative for Omnicron Productions Limited (Omnicron or the company). Omnicron is a video production agency.

[2] Mr Gapes claims that he was unjustifiably dismissed. Omnicron relies on a trial period in Mr Gapes' employment agreement.

[3] An investigation meeting was held on 21 October 2019. I heard evidence from Mr Gapes and Ondrej Havas (Omnicron's executive producer). Until shortly before the investigation meeting Mr Gapes had been represented but his lawyer withdrew. Mr Gapes told me that he could not afford to keep paying his lawyer. At the investigation meeting Mr Gapes indicated that his lawyer had been going to provide him with submissions but had not done so. Both parties proceeded to make submissions.

[4] Mr Gapes subsequently filed further documents. He then sought an opportunity to file formal submissions about his claim as he had felt unprepared without the submissions which his lawyer was expected to provide. The company's representative had no issue with that and so a timetable was set for the applicant's submissions followed by any reply from the company. Mr Gapes continued to provide emails containing further evidence and submissions, with the company eventually objecting. On 10 December 2019 I advised the parties that I had received sufficient information and no further submissions would be considered. Submissions received after that point were not considered.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

**Issues**

[6] The issues for determination are:

- (a) Is Mr Gapes prevented by a trial period provision from bringing an unjustified dismissal claim?

- (b) If not, did Omnicron unjustifiably dismiss Mr Gapes?
- (c) If so, what remedies (if any) should Mr Gapes receive?
- (d) Does Omnicron owe Mr Gapes commission?

### **Advertising and application for position**

[7] In 2018 Mr Gapes returned to New Zealand after working and travelling overseas. He was focused on finding long-term work to help him settle back into Auckland. His experience was primarily in advertising sales work.

[8] Omnicron advertised for a representative to sell and promote a subscription service called Videotaxi. That service was described by Mr Havas as revolutionary, allowing clients to make more video for less money. It had a soft launch in February or March 2018. There was a related company associated with that name but there was no suggestion that Mr Gapes was employed by that company rather than Omnicron. A few subscribers were on board by the time Mr Gapes started.

[9] Mr Gapes was interviewed twice by Mr Havas and the company's consultant mentor, without mention of a trial period. The mentor had known Mr Havas for many years. Mr Gapes was then asked to attend a third meeting, which was to meet the team. The mentor then called Mr Gapes, told him the company wanted him for the job and asked him to come to a meeting on 13 July 2018. There was no evidence that a trial period was discussed during phone calls prior to 13 July.

### **Employment agreement and meeting on Friday 13 July**

[10] On 13 July 2018 at 10.35am Omnicron, by way of email from the mentor, sent Mr Gapes an employment agreement and said that a letter of offer would be provided that afternoon. The agreement stipulated Mr Gapes' start date as Monday 16 July 2018. Mr Gapes said he had not had the opportunity to look at the agreement before he went to the meeting. In any event the email said that the letter of offer would be sent or provided to Mr Gapes when he came in for a meeting that afternoon.

[11] Mr Gapes went into the Omnicron offices that afternoon and did not take a copy of the agreement with him. As set out below the meetings went from 1pm to about 3.45pm.

[12] Initially there was a luncheon session with Mr Havas, the mentor, Mr Gapes and another new person. Mr Havas described the meeting as an opportunity for Omnicron to pitch itself to the candidates. Mr Havas handed Mr Gapes a letter of offer.

[13] Mr Gapes was asked to take a short break so Mr Havas and the mentor could meet one on one with the other person. He went outside briefly. He returned for an extended sales conversation with the mentor for an hour or an hour and a half, including discussion about what Mr Gapes' sales pitch should be.

[14] Mr Havas had some sense of what that session was about but he was not present. He does not recall a discussion with the mentor about what the mentor would talk about at the session.

[15] Mr Gapes says it was only over the weekend that he had time to properly read and consider the agreement and the letter of offer.

### **Monday 16 July**

[16] There is a dispute regarding who arrived at work first on Monday and the sequence of events that day regarding the employment agreement.

[17] Mr Havas says he was at the office first. Mr Gapes says he arrived at 8.30 and Mr Havas arrived at 9am. However, he did accept that it was possible that Mr Havas was present but somewhere else in the building until later. After working at Omnicron he discovered that Mr Havas had regular Monday meetings with the operations manager behind closed doors.

[18] Mr Havas and Mr Gapes met together in a meeting room. Mr Gapes says they talked about the sales pitch, as discussed between him and the mentor on Friday. Mr Havas also provided information about the industry and video production as a service. He says the meeting went for around 45 minutes and the agreement was only mentioned at most in passing. They walked to his office. Mr Havas asked if he had signed the agreement and Mr Gapes replied not yet, as he had some questions. He had brought a copy in with him.

[19] Mr Gapes asked about the timeframe to achieve the first bonus target, seeking that it be moved from December 2018 some months into 2019 to avoid the Christmas close down period. He reports Mr Havas replying that he would think about it. Mr Gapes says that it was about 5pm, after a full working day, when Mr Havas came back saying he had made the

change. Mr Gapes then queried about a second bonus which had been discussed earlier with the mentor but was not in the agreement. Mr Havas said that he had to consult the mentor, as he thought the second bonus was absorbed in the salary. Mr Gapes reports Mr Havas becoming angry, saying “If you’re fucking good, you can write your own cheques. Are we signing the contract or not?” Mr Gapes says he felt his role was in jeopardy so signed under duress.

[20] Mr Havas’ version of events is that the first meeting between the two was mainly about the employment agreement. Mr Gapes raised the issue of the timeframe for the bonus target (along with a job title change), which were quite trivial matters to Mr Havas. At about 9.15am Mr Havas amended the agreement and took it back to Mr Gapes, who signed. Mr Havas denies any 5pm discussion as reported by Mr Gapes, including saying he did not use the foul language mentioned.

[21] Omnicron filed properties information about the agreement indicating that the document was modified at 9.07am and printed at 9.19am on 16 July 2018. Mr Gapes does not accept that the agreement was amended that early. He maintains that he did not get the amended page until 5pm. Mr Gapes questions the genuineness of the properties information. Omnicron strongly refutes any fabrication.

### **Validity of the trial period**

[22] Omnicron relies on its trial provision to preclude Mr Gapes bringing an unjustified dismissal claim. Mr Gapes says that he had not signed the agreement by the time he began work with the company and that he did not have time to get independent advice before signing.

[23] I must firstly be satisfied that Omnicron has complied with the requirements in s 67A of the Act. To be effective trial periods must be entered into in writing prior to the employee beginning work.<sup>1</sup>

[24] The employment agreement between Omnicron and Mr Gapes was signed by both parties sometime on 16 July 2018, with the commencement date specified as being the same day. The question is whether Mr Gapes worked for Omnicron before the agreement was signed.

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<sup>1</sup> Section 67A of the Act and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

[25] I consider whether Mr Gapes can be said to have worked on 13 July 2018. The time on that afternoon was not paid by Omnicron. During the first session with Mr Havas the written offers of employment were made to Mr Gapes and the other person. Mr Havas talked about his vision for the company. I do not consider that portion of the day to be work and so had Mr Gapes signed the employment agreement after this with nothing further occurring, the trial period would have been signed before work begun.

[26] However, the second part of the afternoon involved a session between the mentor and Mr Gapes lasting up to 90 minutes. Mr Gapes' evidence was that the meeting with the mentor would have taken place the following week but was moved forward as the mentor was away that week. The mentor did not give evidence.

[27] Mr Gapes describes receiving sales training, including the mentor confirming Mr Gapes' pitch so the latter could 'hit the ground running' on Monday. I conclude that by returning to the office and participating in the sales meeting Mr Gapes had accepted the offer of employment and that the sales meeting was work for Mr Gapes. At that point he had not yet signed the agreement and there was further discussion and an amendment of some terms the following Monday. Therefore the trial period was not in place at the time Mr Gapes began work and is not effective to prevent Mr Gapes from bringing an unjustifiable dismissal claim.

### **Mr Gapes' work and mentoring**

[28] Both parties agree that Mr Gapes was very excited to be in the position and was very committed to making it work. He and his mentor met every week or two. The mentor identifies 11 dates in an email to Mr Havas from 13 November 2018. Mr Gapes says the mentor described his role as being to manage the relationship between himself and Mr Havas, as there had previously been issues with staff, due to Mr Havas' management style. The mentor indicated that Mr Havas was the way he is and is not going to change.

[29] Mr Havas says that he has extensive experience of managing people but his preference is to be making videos and so he hired the mentor. He himself met on occasions with Mr Gapes about client issues.

[30] Mr Gapes indicated the mentor had sales experience but did not come to assess Mr Gapes' work as the mentor said he would. Also the mentor did not have video

production/technology/product expertise which would have been helpful. Mr Havas refers to Mr Gapes being appointed as a sales person rather than a video producer and notes that growth in sales had resulted from the mentor working previously with other staff.

[31] Through the meetings Mr Gapes' impression was that the mentor was relatively pleased with his progress. He reports that nothing untoward was said at what turned out to be the final meeting with the mentor on 27 September. It does not appear that any notes were taken of the meetings.

[32] Mr Gapes says that aside from the issue of the bonus structure there were never sales targets mentioned. Mr Gapes asked about targets early on and his mentor replied that he should look at his employment agreement.

[33] Mr Havas on the other hand says he was aware from the mentor's feedback that Mr Gapes was struggling. Mr Havas says that Mr Gapes would overstate prospective sales, even coming back saying he had secured business when actually no contract had been signed. He describes an occasion when Mr Gapes reported to Mr Havas knowing that there was a deal because he had looked into the client's eyes and she had looked into his and he knew they had a deal.

[34] Mr Havas also experienced a situation himself when in the early stages of the employment Mr Gapes had sent off a quote to a client without showing Mr Havas and the document was very confusing on the financial side. Mr Havas took Mr Gapes to a client meeting. Mr Havas's impression was it went quite badly whereas Mr Gapes, when asked shortly after the meeting, said it went really well.

[35] To be fair to Mr Gapes I record that there is little or no evidence that most of these matters were raised with him at the time and so the first he heard of some criticisms was at the Authority's investigation meeting.

### **Meeting with Mr Havas**

[36] On 27 September 2018 Mr Havas called Mr Gapes to a meeting and told him that a termination notice would need to be issued. This was on the basis of there being a trial period in operation. Mr Gapes describes this as being a complete surprise, which Mr Havas noticed and commented on at the time. Mr Havas says he was shocked at the time to see Mr

Gapes shocked. He thought it should have been evident to Mr Gapes that things were not going well but accepts Mr Gapes seemed genuinely surprised.

[37] Mr Havas indicated that Mr Gapes had not got any points or runs on the board. After 11 weeks Mr Gapes had only sold a small trial package, which had not continued into a contract. No contracts had been signed.

[38] Mr Havas had the letter of dismissal with him at the meeting and gave it to Mr Gapes to look at. Mr Gapes then asked if there was something else that could be done.

[39] Mr Havas offered the possibilities of gardening leave or that Mr Gapes could stay on for his notice period and try to earn some commission. Mr Gapes said that he had deals that were almost across the line. Mr Havas did not want to take away that opportunity from Mr Gapes. It was agreed that Mr Gapes would work out his notice period.

[40] On 28 September 2018 Mr Havas gave Mr Gapes the letter of termination.

[41] Mr Gapes describes frantically trying different things in his last two weeks to save his job. He says that he asked Mr Havas whether there was anything he could do to hold onto his job, proposing an extension to the trial period. Mr Gapes raised the prospect of freelance work as well as talking to WINZ about the prospect of a subsidy for his job. Mr Havas replied that an extension to the trial period was not going to be possible. He did comment on commission, which I cover below.

[42] Mr Gapes completed a report regarding his meetings with possible clients which Mr Havas requested. On 12 October 2018, his final day of work, Mr Gapes was told by Mr Havas that a target had been made for Videotaxi for the year, namely nine full contracts of 12 months.

[43] Mr Havas provided a reference for Mr Gapes which referred to him as “professional, punctual, self-disciplined and meticulous” as well as working after hours and being self-motivated.

### **Unjustified dismissal**

[44] As I do not accept that the trial period was valid I go on to look at whether Mr Gapes’ dismissal by Omnicron was unjustified. Clearly the termination proceeded on the basis that

Omnicon believed the trial period was effective. The two week notice period given was based on the trial period provision, whereas the agreement provided more generally for a one month's written notice period.<sup>2</sup>

[45] The letter of dismissal refers to Mr Gapes' sales approach and tactics not being able to convert his targets and objectives into reality, despite coaching, direction and discussion. Mr Havas' assessment is recorded as being that the level of sales skills and expertise was not the right fit for the business. The letter outlines a termination on performance grounds.

[46] In situations involving performance, warnings should be given identifying how the employee's behaviour is seen as unsatisfactory, giving clear information about the improvement needed problem, giving the employee the opportunity to improve and identifying how improvement is to be measured.<sup>3</sup> Training and support may also be required.

[47] The mentor did not give evidence and there are no contemporaneous written notes from the mentoring meetings. This creates some difficulty in assessing the quantity or adequacy of the raising of concerns with Mr Gapes. Having considered all the available evidence, I consider it likely that the mentor did raise some concerns with Mr Gapes regarding his performance but that Mr Gapes was not open to hearing them as performance concerns. However, Omnicon failed to give Mr Gapes any warnings. Written warnings would have made it clear to Mr Gapes what the company was not happy about.

[48] In addition, the company's financial requirements were not sufficiently identified for it to take a decision to dismiss when it did. Targets were set in terms of the payment of a bonus but these related to the number of sales before Christmas 2018, which was over five after Mr Gapes started, and two months later in February 2019.<sup>4</sup>

[49] Mr Havas says that the expectation was one sale a month up to December 2018 and the six sales target would not have meant six sales in December. However, he was unable to recall a discussion with Mr Gapes about that and Mr Gapes denied any such discussion.

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<sup>2</sup> Clause 15.1 of the employment agreement.

<sup>3</sup> *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659.

<sup>4</sup> Clause 3.3 of the employment agreement.

[50] The employment agreement also set out commission payments but these were for sales during any calendar year.<sup>5</sup> Omnicron did not identify shorter term sales targets. By the time Mr Gapes was dismissed no period had expired for which a financial target had been set.

[51] In addition the fact the bonus payments targets were for the purposes of determining may suggest that they were aimed at a reasonably high level of performance rather than just the minimum competence level for remaining in employment.

[52] There were also targets of a minimum of five new sales meetings a week, working at least five days a week on Omnicron projects, attending Monday morning meetings and ensuring all business was secured with a signed contract and 50% deposit. It was not evident that Mr Gapes failed to meet those targets.

[53] I conclude that Omnicron did not act as a fair and reasonable employer could do, in deciding to dismiss Mr Gapes at the time it did, without having given him warnings.<sup>6</sup> Mr Gapes was unjustifiably dismissed by Omnicron.

## **Remedies**

### *Lost wages*

[54] Mr Gapes claims three months' lost wages. This amounts to \$17,914.50 gross. He provides proof of applying for a large number of roles thus establishing that he had attempted to mitigate his loss. He was unsuccessful in gaining other employment.

[55] Under s 128(2) of the Act I must order three months' lost wages, unless my consideration of contribution requires a reduction from that sum.

### *Compensation*

[56] Mr Gapes seeks \$20,000 in compensation.

[57] Mr Gapes had been hoping that this was the job to get him re-established in New Zealand. He was committed to making it work. Omnicron was aware that Mr Gapes was seeking a long term position as he had indicated it during the recruitment process, including

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<sup>5</sup> Schedule C of the employment agreement.

<sup>6</sup> Section 103A(2) of the Act.

by email. Omnicron's multifaceted recruitment process suggests it was not looking for a short term option.

[58] Mr Gapes was shocked by his termination and found working out the notice period highly stressful. On the other hand Mr Gapes was not asked to finish immediately as is probably more usual for sales people. He was offered another option but chose to work out the notice period.

[59] I accept that Mr Gapes felt strongly hurt and humiliated. He tried anxiously to do everything he could to hold onto the job in some form, suggesting an extension to the three-month trial, proposing salary subsidy or freelance work.

[60] The dismissal has been very stressful for Mr Gapes with him suffering from anxiety and depression. He filed medical evidence in support of this. His relationship with some family members has been affected. He has suffered from sleepless nights for an extended period.

[61] Mr Gapes lost confidence in working for someone else and feels that his job prospects have been affected. He has been unable to pay creditors and struggled to keep up with regular payments, so accumulating further debt. He has had to put all future travel plans on hold, which he found very disappointing.

[62] I consider also Omnicron's decision to allow Mr Gapes to work out his notice period which could well have softened the blow, although it had negative effects of its own. Mr Havas also gave a glowing reference to Mr Gapes, focusing on the areas of performance and conduct which Mr Havas was able to comment positively about.

[63] I conclude that before considering Mr Gapes' contribution, compensation of \$18,000 would be a fair assessment.

#### *Contribution*

[64] Omnicron raised a number of concerns about Mr Gapes' conduct and performance which it considers contributed to the decision to dismiss him. The mentor's report after Mr Gapes' finished, referred to sales not meeting expectations, his aggressive and defensive behaviour with colleagues, deflecting blame onto others and irrelevant things, as well as not

living up to the information in recruitment about his sales abilities and past results. Not all of these were fully explored at the investigation meeting.

[65] As regards sales, although not impossible, it seems unlikely that Mr Gapes would have achieved the target of six sales for bonus payments by the end of 2018. He worked until mid-October. Only one sale to clients he dealt with, which is the subject of the commission claim, appears to have later come to fruition.

[66] Although this product was unusual, in the world of sales, Mr Gapes' performance was insufficient. Without finding any misrepresentation. Mr Gapes was unable to live up to the impression during the recruitment created about his sales abilities and past results. This was not assisted by his tendency to prematurely put a very positive picture on events which did not have successful outcomes. He appears at times to have been overtaken by his enthusiasm and acted without checking despite being a very new employee. I accept that Mr Gapes was also at times seen as not being open to constructive criticism, tending to deflect blame on other people and things.

[67] I conclude that Mr Gapes did behave in a culpable or blameworthy way. That behaviour contributed to the situation where Omnicron, believing that it was covered by a valid trial period, decided to dismiss.

[68] I have considered carefully at what level contribution should be assessed, taking into account the guidance provided by the Employment Court in cases such as *Maddigan v Director-General of Conservation*.<sup>7</sup> I do not consider the case can be seen as coming close to a situation described as exceptional where a 50% deduction might be contemplated. I assess the contribution as being 25%. This amount is to be deducted from both elements of the remedies.

[69] I therefore order Omnicron Limited to pay Mr Gapes the following sums within 28 days of the date of this determination:

- (a) \$13,435.88 gross as lost wages; and
- (b) \$13,500.00 as compensation for non-economic loss under s 123(1)(c)(i) of the Act.

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<sup>7</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

## Commission

[70] Mr Gapes claims commission for a sale to a company in the health sector which was finalised a couple of weeks after his departure. His agreement provides for sales commission to be paid within seven working days of receiving payment from the client.<sup>8</sup> In addition Mr Gapes relies on promises made during his employment.

[71] A 3 October 2018 email from Mr Havas confirmed that commission would be paid for any sales achieved within the notice period although payment would only be made once the client paid. When Mr Gapes followed up regarding the health sale, Mr Havas emailed in the early hours of the morning of 12 October 2018 confirming that as long as the agreement was signed by 20 October commission would be paid. If there were complications with the negotiations and the contract was not signed by then Omnicron would review the situation.

[72] Mr Havas went overseas and told Mr Gapes to contact another team member, the senior videographer. The videographer let Mr Gapes know on 29 October that a contract was signed. This was after the 20 October deadline. However the videographer wrote that as “per contract we will pay commission on money received. Thus the first payment will be made once we have been paid our first month’s subscription”.

[73] No payment was received by Mr Gapes. He suggests that was not in good faith, however from a legal perspective the duty of good faith ceases when the employment relationship ceases.<sup>9</sup>

[74] Mr Havas was copied in to the 29 October 2018 email from the videographer. He does not recall whether seeing it or doing anything in response to it. He points out that the videographer was a sub-contractor. However, the videographer was the person Mr Havas specified as the main point of contact on Mr Gapes’ commission claim.

[75] Mr Havas describes having extended the timeframe for the contract to be signed for commission purposes but says there was quite a bit of extra work to do by others and changes were needed to the contract to the point where Mr Havas describes it as a new contract.

[76] The agreement provided for commission to be paid. There is no clarification as to which sales will be regarded as attributable to Mr Gapes thus resulting in payment. Often

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<sup>8</sup> Schedule C, clause 4 of the employment agreement.

<sup>9</sup> *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112.

this would be clear in practice. However, in the health company situation Mr Gapes had begun the work but it was finished by others as it was not completed before he left. A fair result may have been a split of commission but that is not provided for in the agreement and I do not see how I can read that in.

[77] In addition there is a difficulty as to whether the offers to pay were variations to the employment agreement whereby Omnicron promised Mr Gapes the commission even though he was not strictly entitled to it. There is no obvious consideration offered by Mr Gapes in return for the promise to pay him commission in those circumstances.

[78] The question whether, and what, consideration is needed for variations is in a state of flux. Although it described the matter as not yet settled in *Teat v Willcocks*, the Court of Appeal did consider that consideration in the form of a benefit ‘in practice’ was sufficient to support a binding variation.<sup>10</sup> In *Gloria Jean’s Coffees International Pty Ltd v Daboko Ltd* Gault J outlined judicial obiter but lack of Court of Appeal precedent for the position that no consideration may be need for variations voluntarily entered without illegitimate pressure.<sup>11</sup>

[79] In the present case there could be seen to be a benefit in practice for Mr Havas’ promise in the early hours of 12 October as Mr Gapes still had work to complete for Omnicron. However, after Mr Gapes finished it is difficult to see how there can be seen to be any benefit in practice to extending the commissions arrangement. I cannot be satisfied that reference to commission in the 29 October email made well after Mr Gapes finished working was sufficient to give him an entitlement to commission.

### **Costs**

[80] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Gapes shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Omnicron shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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<sup>10</sup> *Teat v Willcocks* [2013] NZCA 162 at [54].

<sup>11</sup> *Gloria Jean’s Coffees International Pty Ltd v Daboko Ltd* [2020] NZHC 29 at [28] – [32].

[81] Mr Gapes' former representative did not attend the investigation meeting and that would be taken into account in assessing costs. I would also have regard to the Authority's notional daily tariff.

**Nicola Craig**  
**Member of the Employment Relations Authority**