

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 238
3112322

BETWEEN SEBASTIEN BERNARD
 Applicant

AND REGUS NEW ZEALAND
 MANAGEMENT LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew Steele, counsel for the Applicant
 Alastair Espie and Tariqa Satherley, counsel for the
 Respondent

Investigation Meeting: 26 February 2021 in Auckland

Information Received: 3 March 2021 from the Respondent

Date of Determination: 4 June 2021

DETERMINATION OF THE AUTHORITY

A. The claim is dismissed.

B. Costs are reserved, subject to the timetable for submissions mentioned below.

Employment relationship problem

[1] Sebastien Bernard worked for Regus New Zealand Management Limited as an area sales manager (ASM) until he was dismissed on 9 April 2020 and paid notice in lieu. The dismissal followed a series of interactions between Regus and Mr Bernard over his

performance. Mr Bernard says that he was unjustifiably dismissed.

[2] Mr Bernard's personal grievance of his dismissal for poor work performance being unjustified was raised by his lawyer in correspondence dated 22 April 2020. Despite mediation, the problem was not resolved. Mr Bernard commenced this action in the Authority in July 2020. Regus says it justifiably dismissed Mr Bernard. This determination resolves the employment relationship problem.

[3] There is a substantial amount of documentation of the various events. I will set out those events in greater detail to give context to the problem, before identifying the issues for determination and explaining my findings on those issues.

What happened

[4] There is a written employment agreement. It did not include a job description or set minimum job requirements such as sales targets. It references a disciplinary and grievance procedure found on the company's intranet. It requires Mr Bernard to comply with company rules, policies and procedures as set or varied by the company. There was a 90 day probation period, during which the agreement could be terminated on one week's notice. Following the successful completion of the probationary period, the agreement could be terminated on one month's notice in writing.

[5] Regus offers customers shared office spaces. It has 12 centres in New Zealand and is part of a worldwide business model. Mr Bernard was allocated two Regus Centres in Auckland to manage. Ten others were allocated to other ASMs. Potential clients who contact Regus directly about a specific centre are referred to the centre's allocated ASM. ASMs also generate their own sales opportunity through their existing clients, responding to referrals from brokers and other referrers, developing their own networks through industry groups and business associations and through their own social media channels.

[6] Regus says that ASMs are given comprehensive induction and training, all of which was provided to Mr Bernard when he started. Mr Bernard is critical about the level of induction and training. However, Regus sets targets and tracks achievements against targets for its ASMs. This was known to Mr Bernard.

[7] Mr Bernard was overseas on leave for three weeks, returning in mid-June 2019.

Regus approved Mr Bernard's leave when it employed him.

[8] Alexander Sykes is the manager and sales director for Regus in New Zealand. He was not Mr Bernard's direct manager. On 2 July 2019, Mr Sykes sent Mr Bernard an email under the subject "Sebastien Bernard Performance Improvement Plan". The email set out concerns, a performance improvement plan and expectations starting from 3 July. Klaudia Misnyovszki was as area operations manager. Mr Sykes in his 5 August email to Mr Bernard refers to continued performance issues in July and says that Ms Misnyovszki will set up meetings during August to set minimum expectations and review progress on meeting the expectations. There are minutes of meetings between Mr Sykes, Ms Misnyovszki and Mr Bernard on 6 August, 14 August, 21 August and 29 August. The minutes were circulated after each meeting, without any issue being raised about their accuracy. There is no reason to doubt that the minutes correctly reflect the discussions at the time.

[9] Following the 29 August meeting, Ms Misnyovszki sent Mr Bernard an email at 4.36pm on 4 September. In it, Ms Misnyovszki says that the company is proposing that Mr Bernard be issued with a warning in respect of the performance concerns. It states "Prior to any decision being made, we would like to provide you with an opportunity to respond to this proposal". Mr Bernard is asked to respond to Mr Sykes before close of business on 5 September. Attached to the email was a letter dated 2 September to Mr Bernard under the heading "Re: First Official warning of unacceptable Sales Performance". It was signed by Mr Sykes with a space marked for Mr Bernard's signature under the words "Understood, agreed and accepted by".

[10] Mr Bernard signed the 2 September letter and returned it on 5 September without any further exchanges between him and Mr Sykes. The warning letter set out standards against which Mr Bernard's performance would be assessed in September, with a review set for 30 September.

[11] There was a meeting between Ms Misnyovszki, Mr Sykes and Mr Bernard on 6 September and Ms Misnyovszki then sent minutes which included the September goals. Mr Bernard acknowledged the document. There were other weekly meetings in September and Ms Misnyovszki circulated the minutes. There is no reason to doubt that the minutes

are a correct record of the discussions.

[12] On 9 October, Ms Misnyovszki sent Mr Bernard an email. It referred to a review of Mr Bernard's performance in September, what had been said by Mr Bernard at a meeting on 27 September and a review of his previous performance. Ms Misnyovszki stated that the company was proposing to issue Mr Bernard with a warning and to place him on a further performance improvement plan commencing 11 October. Mr Bernard was asked to respond in writing to the "proposal" to Mr Sykes, prior to close of business on 10 September 2019. Attached to the email was a letter in the form of a "Second Official warning of unacceptable Sales Performance" signed by Mr Sykes. The letter included a line for Mr Bernard to sign confirming "Understood, agreed and accepted by".

[13] Mr Bernard signed the attached warning letter and returned it to Ms Misnyovszki and Mr Sykes on 10 October at 1.58pm. His email read "Hi Both, Here is the document signed. Thanks".

[14] Meetings and minutes in respect of the performance improvement plan followed on 11 October, 18 October, 25 October, 1 November, 8 November, 22 November, 6 December and 13 December.

[15] Mr Bernard's evidence is that he told Mr Sykes at the end of the year that he was overwhelmed with pressure and stress, had lost confidence, could not sleep and felt threatened every week. Mr Bernard's evidence is that Mr Sykes told him it was the same for everyone and he had to deal with it. Mr Sykes' evidence is that they agreed to put the performance improvement plan on hold to see if it would ease the pressure to help Mr Bernard improve, in response to several requests from Mr Bernard. I find that Mr Sykes' evidence is a more accurate characterisation of the exchange with Mr Bernard in about December 2019. Nothing further of substance happened in January and February 2020.

[16] There is a record of a meeting on 9 March 2020 between Mr Sykes and Mr Bernard. Ms Misnyovszki and the team leader attended. Mr Bernard in his evidence says that Regus started an "informal" performance improvement plan in March. However, I find from the record of the meeting that the reason for the plan and the expectations to be met were discussed with Mr Bernard. There was an email exchange between Mr Bernard and

Ms Misnyovszki on 11 March. Mr Bernard set out a bullet point list of goals he considered were achievable for the month of March 2020. The exchanges resulted in a “Performance Improvement Plan” dated 16 March 2020 incorporating those goals. Mr Bernard’s evidence is that he was not given the opportunity to give feedback on the “targets”. However, the record of the meeting and the email exchange show that Mr Bernard’s evidence is incorrect.

[17] Regus wrote to Mr Bernard on 31 March 2020 under the heading “NOTICE TO ATTEND SHOW CAUSE MEETING”. The meeting was scheduled for 1 April, its purpose was “to discuss your ongoing employment” and the “concern being addressed” was Mr Bernard’s poor work performance in failing to meet performance targets. That was stated as the basis on which “...we are considering terminating your employment”. The letter assured Mr Bernard that his responses would be considered “before a final decision is made”. Mr Bernard says he was not given an opportunity to be represented or supported “at the meeting”. I return to this point below.

[18] By agreement, the meeting was deferred until 2 April, so Mr Bernard’s support person (Leigh Olsen) could attend. In an email Mr Sykes stated that the “role” of a support person was to provide personal support and could include note taking but did not extend to that person answering questions on Mr Bernard’s behalf. At the start of the meeting, Mr Sykes repeated the instruction but Ms Olsen said she was authorised to act for Mr Bernard so had some questions and there were concerns “we wanted to get clarity on”. Mr Sykes brought the meeting to an end. Following the meeting, Mr Sykes asked for the “questions or concerns” to be presented that day, so they could “take these onboard and address” them before the meeting was reconvened. Ms Olsen responded by email later on 2 April. Ms Olsen included her authority to represent Mr Bernard, under s 236 of the Employment Relations Act 2000.

[19] Later on 2 April Mr Bernard sought to defer a meeting set for the next day on the basis of feeling “really unsettled and distressed” following the events earlier. Mr Sykes in reply suggested that Mr Bernard take sick leave “tomorrow” and agreed to defer the meeting until Monday 6 April. Mr Sykes repeated his description of the role of a support person. Later, Mr Bernard asked for the specific purpose of Monday’s meeting and the potential outcome from it, saying he was “confused” whether Ms Olsen was permitted to

attend. Mr Sykes replied saying its purpose was to discuss and review performance, goals and the performance improvement plan and for Mr Bernard to explain why the “expected targets or the reduced targets” had not been achieved. He confirmed Ms Olsen could attend but considered it would be difficult for her to answer and comment on Mr Bernard’s performance. Those personal views “should come from you”. Mr Bernard acknowledged the response and repeated his earlier request for an explanation of the potential outcome. In reply, Mr Sykes said “This will then be considered and may result in disciplinary action, up to and including termination”. “This” referred to the overall review of Mr Bernard’s performance against the “performance management plan” and his “additional or clarifying information” provided.

[20] That meeting proceeded on 6 April. It also involved Remco van Oers, Regus’ Global HR Manager. On 7 April, Mr van Oers replied to Ms Olsen’s 2 April email.

[21] A meeting was arranged for 9 April. Ms Olsen says that Mr Sykes told them they were issuing Mr Bernard with a third and final warning, then “in the same sentence” said they were terminating Mr Bernard’s employment. Mr Bernard’s evidence is that he was informed on 9 April that his employment was being terminated “with immediate effect”. He does not say that he was told he would receive a third warning and then told he was dismissed. Lawyers acting on Mr Bernard’s instructions in a 22 April letter say “On the 9th of April, Mr Bernard was informed that his employment was terminated with immediate effect”. That is reflected in the statement of problem. Mr Sykes’ evidence is that he decided to “move forward with dismissing” Mr Bernard. Mr van Oers’s evidence is that Mr Sykes made a final decision to dismiss Mr Bernard, confirmed by letter of 9 April. In light of the evidence from Mr Bernard, Mr Sykes and Mr van Oers, Ms Olsen’s evidence described above is unlikely to be correct. Mr Sykes told Mr Bernard during the meeting that he was dismissed. He did not say Mr Bernard would receive a third warning. There is no reason to doubt Ms Olsen’s evidence that they received the outcome letter that evening.

[22] Mr Bernard was advised his employment was terminated immediately, he would be paid in lieu of notice and his last day of work was 9 April. He was asked to return company property after the end of the then current Covid-19 lockdown. Mr Bernard’s computer access was disabled from 10 April.

[23] Mr Bernard raised a personal grievance of unjustified dismissal through his solicitor's letter dated 22 April 2020. Mr Bernard says he was dismissed in circumstances that were unfair, unreasonable and substantively unjustified.

[24] Regus must show its actions and how it acted were what a fair a reasonable employer could have done in all the circumstances at the time. The following issues arise:

- (a) Did Regus sufficiently investigate the allegations, before the dismissal?
- (b) Did Regus raise its concerns with Mr Bernard, before the dismissal?
- (c) Did Regus give Mr Bernard a reasonable opportunity to respond, before the dismissal?
- (d) Did Regus genuinely consider Mr Bernard's explanations, before the dismissal?
- (e) What other factors should be considered?
- (f) Did Regus breach its duty of good faith?
- (g) If Mr Bernard was unjustifiably dismissed, what remedies should be awarded?

Did Regus sufficiently investigate the allegations, before the dismissal?

Did Regus raise its concerns with Mr Bernard, before the dismissal?

[25] It is convenient to consider these two issues together.

[26] There is a well-documented trail of exchanges between Regus (principally Mr Sykes) and Mr Bernard to demonstrate that Regus raised its concerns about Mr Bernard's performance, from 2 July 2019. In that email, Mr Sykes referred to the discussion over the previous weeks, the specific concerns about not meeting metrics and below standard performance. A performance improvement plan was implemented.

[27] The 31 March 2020 letter identified substantially similar performance concerns, as

follows:

The areas of concern being addressed within the meeting relate to poor work performance and achievement of KPI's in accordance with the expectations of your role and responsibilities as an Area Sales Manager, specifically as follows:

- Failure to meet sales performance targets
 - Conversion rate ED
 - Conversion rate TD
 - WS and SQM delivered
 - Sales revenue
 - Total deals
 - Office deal

[28] I accept that Regus was motivated to assist Mr Bernard to lift his performance. Various supports were available to Mr Bernard, as is demonstrated by the documentation trail. On-line training tutorials were available. Mr Bernard's evidence is that he watched them multiple times. There is no reason to doubt that evidence. Initially, there was a three week delay in supplying Mr Bernard with a work computer. I accept that would have affected the effectiveness of the on-line support during the three weeks. However, it is not a relevant factor when considering the performance concerns from July 2019 to April 2020. Mr Bernard also received training in the form of shadowing colleagues in the performance of their sales activities. A senior manager also provided two mock tours, pretending to be a client, to assist Mr Bernard. After Mr Bernard returned from a pre-arranged break, he was provided some further training in June 2019 with a team leader (Erika Jury). I accept Ms Jury's evidence that she continued to provide support to Mr Bernard.

[29] Mr Bernard says that his employment agreement did not have a job description attached and minimum requirements such as expected levels of sales were not set out. However, the agreement expressly incorporated and required compliance with staff rules and policies. It is well established by the documentation trail that Mr Bernard was expressly aware of and agreed to specific sales performance targets.

[30] Mr Bernard says he was "shocked" to receive the 25 June 2019 email from the senior manager. He says Ms Jury was also shocked. I prefer Ms Jury's evidence that she was "surprised" at the email. The email is headed "Concerns". The manager characterises his message as "harsh". He starts by saying "It has been brought to my attention that your focus, commitment and efforts are less than acceptable". While there might be an issue about the tone of the email, Mr Bernard must have understood from it that Regus then held

concerns about his performance. The performance concerns eventually resulted in his dismissal.

[31] Regus is a substantial business with resources available to properly and fully investigate concerns before making a decision to dismiss an employee. I find that Regus raised its concerns and sufficiently investigated them, before deciding to dismiss Mr Bernard.

Did Regus give Mr Bernard a reasonable opportunity to respond, before the dismissal?

[32] Regus is part of the IWG global group. There is an IWG “Global Disciplinary Policy”. In summary, employees are entitled to be treated fairly and in line with applicable laws. It provides for disciplinary meetings where appropriate. Allegations should be explained in full. The employee should have an opportunity to respond and explain. The decision maker should review the employee’s representations and the evidence gathered. The employee should be promptly informed in writing of the decision and the reasons for it. If possible, this should also be explained in person. Possible sanctions are warnings (verbal, written, final written) and dismissal.

[33] There is also a “Global Performance and Capability Policy”. It is intended to “enable employees to reach the required standard”. Serious performance issues entitled IWG to start a Performance Improvement Plan (PIP) “and/or” initiate disciplinary processes. The manager would inform the employee about the serious performance issue in writing and invite the employee to a meeting to discuss concerns. A PIP is ideally an agreed plan. It contains timescale, performance targets, support measures and feedback. If the PIP does not lead to sufficient and sustained improvement, the employee will be invited to a performance management hearing. Outcomes include a further PIP, a warning, an offer of redeployment to alternative work or a decision to dismiss the employee. If IWG believes:

that there is no suitable alternative role available and suitable for the employee, but that equally they have not met an acceptable standard of performance, the organisation may decide to dismiss. Any dismissal will be

with full notice or payment in lieu of notice. The decision to dismiss together with the reasons for the dismissal will be set out in writing and sent to the employee.

[34] The Employment Relations Act 2000 entitles an employee to authorise any other person to act on their behalf in exercising statutory employment rights. That right might not be directly engaged in the context of a disciplinary meeting.¹ However, an employer would probably not act fairly and reasonably if they prevented or did not provide for an employee to be represented in such a meeting. I am reinforced in that view here, as the policy is expressly subject to local legislation that might allow the right to be accompanied to meetings by a colleague or trade union representative.

[35] Mr Sykes objected to Ms Olsen speaking on 2 April and the meeting did not proceed. On 6 April, Ms Olsen spoke and raised several points. However, the matters she had raised on Mr Bernard's behalf by her 2 April email were mostly not canvassed. I will summarise them. An explanation was sought for the 2 April meeting not continuing and clarification of its purpose. The 29 August 2019 meeting, in advance of the 2 September 2019 warning, was conducted unfairly. The decision to issue a warning was pre-determined as the 4 September email that raised performance concerns included a signed warning letter dated 2 September. A similar issue arose with the second warning. Mr Bernard had not been given sufficient time or skills training to become proficient and Regus had given insufficient consideration to the effect of Mr Bernard's agreed absence in June 2019. The PIP in August was punitive rather than supportive. A PIP was arbitrarily re-instigated in March 2020 without consultation. These actions had caused Mr Bernard stress and anxiety.

[36] Mr van Oers replied to the email on 7 April. I will summarise the response. The meeting had been to discuss Mr Bernard's performance, rather than process issues. Mr Sykes thought it better to postpone the meeting. The 29 August meeting was fairly conducted, taking account of the preceding PIP exchanges. The evaluation of a PIP might be that it was successful, needed to be prolonged or might result in a warning. A proposed warning necessarily preceded the date it was sent. Because Mr Bernard signed and returned it, Regus concluded that he accepted the proposed warning. Similarly,

¹ *Gurnell v. School Centre Irene Ltd*, ERA Auckland AA 18/08, 22 January 2008.

Mr Bernard had the opportunity to respond to the October 2019 warning letter. Regus considered its actions over the PIP and the warnings were in substance fair and reasonable. Regus considered that Mr Bernard had been given sufficient time and training, but a PIP was started because he had not met minimum targets. That was the case, even ignoring June 2019, when Mr Bernard was away. A PIP was not punitive, but was supportive. The PIP was deferred for January and February, as Mr Bernard thought he would perform better without the PIP in place. Mr Bernard met minimum requirements in January, but not in February. Regus communicated with Mr Bernard over this and the PIP being reinstated. Regus considered its processes had been fair. Ms Olsen was asked to respond by 8 April, ahead of Regus' decision on 9 April. Ms Olsen in reply disagreed with Mr van Oers' view but made no further points of substance.

[37] Taking account of the 6 April 2020 meeting and the email exchange with Ms Olsen, I find that Regus gave Mr Bernard a reasonable opportunity to respond to the performance concerns it raised in its 2 April letter.

[38] Mr Bernard did seek support, advice and representation from Ms Olsen, despite not being advised of that right by Regus. Regus initially did not treat Ms Olsen as Mr Bernard's representative. However, the exchanges on 6 April, by email on 2 April and 7 April and arrangements for Ms Olsen's involvement on 9 April demonstrate that Mr Bernard responded through Ms Olsen, prior to the dismissal. In light of that, Regus' failure to expressly advise Mr Bernard about representation and its initial resistance to Ms Olsen exercising that role, must be regarded as minor procedural defects that did not result in any substantive unfairness to Mr Bernard.²

Did Regus genuinely consider Mr Bernard's explanations, before the dismissal?

[39] During the 6 April meeting, Mr Bernard said that he had never really understood the process of the PIP, put in place soon after his return from his trip. Mr Bernard accepted there was some training and support by phone, but did not agree that it was "a lot". Mr Sykes outlined the support and training that had been provided, which he characterised as "quite substantial". Mr Sykes accepted that Mr Bernard had diligently followed up on his activities, but was still not performing with regard to conversions. Regus had deferred

² Employment Relations Act 2000, s 103A(4).

the PIP for January and February as requested. Mr Sykes asked Mr Bernard for his thoughts about the lack of performance. Mr Bernard said that January was a good month. Mr Sykes agreed, but canvassed the February data. The February concerns resulted in the PIP being resumed. Ms Olsen queried whether sufficient time had been allowed, between the March PIP and the 31 March “Show Cause” letter, to turn around performance especially in light of the Covid-19 lockdown. Mr van Oers commented that January, while a good month for Mr Bernard, was not a good month by reference to general standards. Mr van Oers referred to the period in March where there was the ability to sell, so an expectation of 13 deals against the achievement of one. Regus had not seen progress, despite its support. Mr van Oers queried what more training and support Mr Bernard expected during the PIP from August. Mr Bernard said more in person training. He also mentioned the pressure and stress and his loss of confidence. Mr van Oers replied that the intention was to improve Mr Bernard’s performance, as seen in January. He asked what had happened in February. Mr Bernard queried the February numbers and referred to the developing Covid-19 uncertainty. Mr Sykes referred to the target adjustments that had been made in March, then returned to the training and support Mr Bernard had been provided. Mr Bernard said he was feeling stressed and threatened. He asked to stop the meeting and reschedule it. Mr van Oers was willing to continue the meeting the following day. However, the meeting was adjourned briefly at Ms Olsen’s request. When it resumed, Mr Bernard confirmed he felt he had been underperforming. He accepted that there had been some training and support, but disputed whether assistance from several colleagues should be counted as training. Mr Sykes thought that assistance from experienced colleagues was part of the support. Mr Bernard then said that the warning letter and disciplinary process were not correct. Mr Bernard and Ms Olsen confirmed that they had nothing more to add. Mr van Oers confirmed he would reply to Ms Olsen’s 2 April email. Ms Olsen requested when and how they would hear the outcome. Mr van Oers suggested by “Wednesday”, by phone meeting again.

[40] I have summarised the 2 April and 7 April emails above.

[41] I refer to the earlier findings about the meeting on 9 April. I will summarise the 9 April dismissal letter as it reflects what was said during the meeting and Mr Sykes’ reasons for dismissing Mr Bernard. The last seven months had involved PIPs, two having

led to formal work performance warnings. Assistance, training and support had been provided. However, Mr Bernard had not met the agreed minimum targets. In meetings following the second warning, Mr Sykes had said that Mr Bernard's performance was not up to standard. In the 31 March letter, the 2 April meeting and the 6 April meeting, Mr Sykes had explained why he considered Mr Bernard's performance was not satisfactory and why he faced potential dismissal. Mr Bernard acknowledged his performance was "subpar" but felt the process to improve that was unfair and unreasonable. Despite that, Mr Sykes had reached the view that it was appropriate to terminate Mr Bernard's employment. The letter ended with instructions and information about property and final pay.

[42] Counsel refers me to *Yan v Commissioner of Inland Revenue*.³ The following points are established from a review of the documentary record. Regus became dissatisfied with Mr Bernard's work performance. Mr Bernard was told of Regus' dissatisfaction, as early as late June 2019. Performance standards were set and reset, by reference to the company's general expectations and through exchanges with Mr Bernard. The information given and available to Mr Bernard was readily comprehensible to Mr Bernard, it was an objective critique of his work and an objective statement of standards to reach. Mr Bernard was given a reasonable time to attain the standards. Regus used an objective assessment of measurable targets. Regus fairly put its tentative conclusions to Mr Bernard. Regus listened to Mr Bernard's explanation with an open mind. It considered Mr Bernard's explanations. It had exhausted reasonable remedial steps.

[43] I am also referred to *Bagchi v Chief Executive of the Inland Revenue Department*.⁴ There, the Court observed the difficulty for it to determine the many elements of a performance dismissal, compared to the employer. The employer sets the expected standards and must assess them. The employer must deal with the business consequences of poor performance. The role for the Court is to ensure that a dismissal was taken in good faith, and that the decision was fairly and reasonably open to the employer to make. Those comments are apposite here, even though *Bagchi* did not involve the application of s 103A

³ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36. Mr Yan's applications for leave to appeal were declined: *Yan v Commissioner of Inland Revenue* [2015] NZCA 401 and *Yan v Commissioner of Inland Revenue* [2015] NZSC 170.

⁴ *Bagchi v Chief Executive of the Inland Revenue Department*, AC 40/08, 26 September 2008.

of the Employment Relations Act 2000.

[44] I find that Regus genuinely considered Mr Bernard's explanation in response to its concerns. Regus did not predetermine matters. However, Mr Sykes was not satisfied with Mr Bernard's response, so decided to dismiss him.

What other factors should be considered?

[45] There is a submission that Regus did not comply with the Employment Relations Act 2000 in the form of the employment agreement and the steps it took with Mr Bernard as to its formation, by not bargaining fairly with Mr Bernard and by not including a plain language explanation of the services available for resolving employment relationship problems. I need not make any findings about these matters as no specific remedies are claimed for these issues. In any event, statutory breaches at the time of the formation of an agreement do not necessarily bear on whether a later dismissal was justified.

[46] Mr Bernard was allocated facilities to manage. The submission is that it was unfair to penalise Mr Bernard for matters that were not within his control. I am referred to *Nimon & Sons Ltd v Buckley*.⁵ In that case, the employer presented the employee with a performance plan. It included responsibility for outcomes over which the employee had no control. The example given was cost effectiveness in the workshop, but the employee had no control over the workshop budget. The present circumstances differ significantly. The assigned facilities were one sales channel. Centralised and broker inquiries about a particular facility were directed to the facility's ASM. However, ASMs were free to sell any Regus facility to potential clients, sourced through their own networks. Mr Bernard had a measure of control over the outcome of all his sales work.

[47] Counsel submits that a fair and reasonable employer could not dismiss an employee for poor performance, unless the employee had been subject of a graduated warning process, putting the employee on notice that their on-going employment was at jeopardy. I am referred to *Gostmann v Independent Refrigeration and Electrical Limited*.⁶ I also note that the IWG Performance policy anticipates that PIP processes are first utilised, a formal

⁵ *Nimon & Sons Ltd v Buckley* (2008) 8 NZELC 99,220.

⁶ *Gostmann v Independent Refrigeration and Electrical Limited* [2012] NERA Auckland 467.

warning might follow for continued poor performance before the dismissal is considered.

[48] Counsel submits that there were flaws in the PIP process “imposed” on Mr Bernard. That includes the two warnings. The substantial difficulty now is that Mr Bernard has not sought leave to raise grievances and challenge justification of actions by Regus that predated the March 2020 PIP, followed by the dismissal process. In addition, Mr Bernard signed both warnings indicating their acceptance. Justification for decisions by Regus to implement PIPs and the decisions by Regus to formally warn Mr Bernard by letters dated 2 September 2019 and 4 October 2019 cannot be challenged in these proceedings.⁷ Those events remain contextually relevant to the present proceedings. However, that does not assist Mr Bernard. The documentary record supports Regus’ account of events. The PIPs and the warnings help establish that Regus took other appropriate steps over a lengthy period, before it raised the possibility of dismissal.

[49] On 6 March 2020, Regus alerted Mr Bernard to a proposal to put in place another PIP. That was considered at a meeting on 9 March 2020. The minutes show matters were fully discussed then. March PIP targets were proposed, then agreed. Mr Bernard on 23 March proposed lower targets that he felt “will be more achievable in this unstable period”. That was discussed and agreed, with Mr Sykes saying that the targets were a “must hit”. Mr Bernard said he understood. Mr Sykes also mentioned that there had been PIP for “some time” and that there had been a “couple of warnings”. From the discussion on 23 March, it was apparent that Regus felt it had exhausted other options. Mr Bernard was on notice of what was at risk should he not meet the PIP, but no decision as to dismissal had been made at that point. The present case differs from those cited in submissions.⁸ On 30 March, Mr Bernard requested and Mr Sykes agreed to focus on just the first three weeks of March, given the lockdown. The current circumstances, including the Covid-19 response measures, were canvassed in discussion that day. Following these exchanges, Mr Sykes was of the view that Regus had reached the point of considering dismissal as an option. He initiated consideration of dismissal by way of the 31 March “Show Cause” letter. I find that Regus was entitled to do so.

[50] There is a submission that Mr Bernard was treated differently to another employee.

⁷ *Coy v Commissioner of Police* EmpC Christchurch CC23/07, 19 November 2009.

⁸ *Scown v Marubeni Auto Sales Ltd* [1991] 3 ERNZ 655 and *Caltex Oil (New Zealand) Limited v Sales Representative Guild (Apex)* [1990] 2 NZILR 207 (LC).

Nothing is known about the circumstances of the other employee. I do not accept that there was a difference in the treatment of Mr Bernard, compared to another employee, so as to establish that Regus' decision to dismiss Mr Bernard was unjustified.

[51] Mr Bernard was not a New Zealand citizen and English is not his first language. However, Mr Bernard's proficiency with English meant that he understood what was being communicated and the potential consequences of Regus' actions throughout. Although Mr Bernard referred to English as being an issue for himself during the initial PIP processes, the goals he agreed to took that into account. Mr Bernard's performance fell substantially short of the goals, for the most part.

Did Regus breach its duty of good faith?

[52] As will be apparent from the foregoing, Regus was active and constructive in seeking to maintain a productive employment relationship with Mr Bernard. It was responsive and communicative throughout, but without success.

Summary

[53] Taking the above factors and the statutory factors into consideration, I find that Regus' actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time. Mr Bernard's claim must be dismissed.

[54] I am asked to reserve costs and will do so. A claim for costs can be made by lodging and serving submissions in support within 28 days. The other party may lodge and serve submissions in reply within a further 14 days. A determination on costs will follow.

Philip Cheyne
Member of the Employment Relations Authority