

**Attention is drawn to the non-publication order at paragraph [1] of this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 44  
5423576

BETWEEN MR A  
Applicant  
  
AND B LIMITED  
Respondent

Member of Authority: Christine Hickey  
Representatives: Philippa Tucker, Counsel for Applicant  
Scott Wilson, Counsel for Respondent  
Investigation Meeting: 25 February 2014  
Submissions Received: At the investigation meeting  
Determination: 24 March 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr A was unjustifiably dismissed.**
- B. B Limited must pay Mr A:**
- (i) \$6,750 in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000; and**
  - (ii) lost wages for 3 months reduced by 25%.**
- Leave is granted for Mr A to return to the Authority to calculate the amount of lost wages if the parties are not able to agree.**

**Employment relationship problem**

[1] I confirm the order made at the investigation meeting under clause 10, Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the

publication of the name of the applicant and any information which may identify him. I prohibit from publication any details of his offending beyond what is contained in this determination. I also prohibit from publication the name of the respondent. I have referred to the applicant throughout this determination as Mr A and to the respondent as B Limited (B Ltd). The letters chosen bear no relation to the parties' real names. I note that the respondent had no objection to the application that Mr A not be publicly identified.

[2] Mr A was employed by B Ltd between October 2000 and September 2003 by one part of B Ltd's operations. He was then employed from September 2003 until March 2007 by another aspect of B Limited's operations. In March 2007 he applied to be appointed to another role in another part of B Limited's operations. All three aspects of the operations were in one city.

[3] As part of the application process for the position he was appointed to in 2007 Mr A was required to fill in an application form and answer Yes or No to a number of questions, including:

*Have you ever been convicted of a criminal offence?*

[4] Mr A answered *No*. He signed the application under a declaration including:

*The information I have provided herein and in response to questions clarifying the information is true and correct.*

[5] In fact, Mr A does have criminal convictions. In 1990 and 1992 he was convicted of serious offences for which he served two separate terms of imprisonment. As a result of those convictions he also lost the ability to pursue his originally chosen career. Mr A's name was suppressed by the sentencing court in relation to those convictions on the basis that identifying him could lead to identification of his victims.

[6] In 2002 Mr A was convicted of drunk driving and was disqualified from driving for six months. That was his first conviction in 20 years. He was employed by a branch of B Ltd at the time and his manager was aware of the fact that he had lost his licence. Mr A used that manager as a referee in 2007. However, he did not disclose the drunk driving offending on his 2007 application form.

[7] In March 2012 Mr A was promoted to a management role in which he was the most senior employee based at the B Ltd premises in which he worked. In early April

2013 B Ltd discovered his convictions and discovered that he had not been truthful in his 2007 application form. Mr A was dismissed on 18 April 2013.

[8] Mr A alleged that he was unjustifiably dismissed. He says that B Ltd did not have substantive cause to dismiss him and did so in a procedurally unfair manner. He seeks lost wages for a period of three months after dismissal, compensation for hurt, humiliation and loss of dignity and legal costs.

[9] B Ltd says that it was justified in dismissing Mr A and did so because he lied on his application form and because his offending was of the kind that meant it was impossible to keep him employed because his offending was greatly at odds with the company's culture and values.

### **Issues**

[10] The Authority needs to determine:

- (a) Whether B Ltd had good substantive reasons in all the circumstances to dismiss Mr A;
- (b) If so, whether it followed a fair process in all the circumstances;
- (c) If not, whether Mr A is entitled to any remedies including consideration of whether the remedies should be reduced because of any contribution by Mr A to the situation leading to the personal grievance.

### **Background facts**

[11] In 2012 Mr A was promoted and signed a new employment agreement. As a part of his new role he was required to hold a Secondhand Dealers Licence and applied to do so. As a part of the process the Police were asked if they had any objection to him being granted a licence.

[12] On 5 April 2013 a letter addressed to Mr A was delivered to B Ltd and opened by a credit control manager who passed it on to Mr C, Mr A's manager. Mr C showed the letter to Mr D, who was his manager. The letter contained the Police objection to Mr A holding a Secondhand Dealers Licence and set out his three

convictions, including the 1990 and 1992 ones for which he had name suppression.<sup>1</sup> The letter also included some comments from the Police about the nature of the offending and why the Police considered the offending rendered Mr A an unsuitable person to hold a licence.<sup>2</sup>

[13] Mr C consulted with B Ltd's human resources adviser, Mr E. Mr E happened to be in town on holiday and Mr C and Mr E agreed to visit Mr A at work on 8 April 2013 to tell him about B Ltd's concerns. They arrived at the work premises at 9am.

[14] Mr E led the meeting and told Mr A that there were a couple of serious matters that they wished to let him know about but that he would have an opportunity to seek legal advice. Mr E then showed Mr A the letter confirming the Police objection to his application for a licence and a copy of the objection from the Police outlining the detail of his convictions. He told Mr A that B Ltd was concerned that Mr A had misled B Ltd when he applied for employment in 2007, and concerned about the serious nature of his convictions.

[15] Although Mr E told Mr A that he did not need to give an explanation of his actions at that point, Mr A said that he had been told by WINZ not to disclose his convictions and he understood that was because he would have struggled to get a job otherwise. Mr E advised Mr A to take legal advice and suggested that perhaps the Community Law Centre could assist him. Mr E told Mr A that there would need to be a meeting between him and B Ltd once he had obtained legal advice.

[16] Mr C then had to leave the meeting and Mr E remained with Mr A. Mr A became extremely upset. Mr E was concerned about Mr A's safety. Mr E took Mr A to see his GP. They both spoke to his doctor. After receiving confirmation that Mr A was safe Mr E left and Mr A returned to work.

[17] Mr C telephoned Mr A after he had returned to work and told him that he would be away for a few days and that Mr A should contact Mr D who would deal with the matter in Mr C's absence.

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<sup>1</sup> It appears that the Police were unaware of the suppression orders, which is surprising. However, the offending did not occur in the town where Mr A was employed.

<sup>2</sup> After an objection by Mr A's lawyer and submissions on his behalf Mr A was granted a licence by the Licensing Authority of Secondhand Dealers and Pawnbrokers on 6 May 2013.

[18] Mr A attempted to contact Mr D twice and left telephone messages for him. However, when Mr C returned to work on Monday, 15 April 2013, he became aware that Mr A and Mr D had not met. He arranged to meet with Mr A that afternoon.

[19] Mr C checked whether Mr A had obtained legal advice and reiterated to Mr A that B Ltd's concerns were serious matters. He asked Mr A to telephone his lawyer and Mr C spoke directly to Ms Tucker. Mr C says that he explained the seriousness of the situation to Ms Tucker that day. After that discussion, Mr C told Mr A that he was stood down on pay until matters were resolved. He told Mr A that he should think about things and that he needed to make a decision. Mr C told Mr A that he wanted matters resolved quickly. Mr A's understanding was that Mr C wanted him to resign.

[20] Mr A asked if he could stay at work until the end of the day. After seeking advice from Mr E, Mr C confirmed that it was alright for him to stay at work until the store closed, which Mr A did.

[21] The following day, Mr A stayed away from work and went to consult Ms Tucker. Later that day Mr C rang Mr A and asked what was happening. Mr A told him that he expected Ms Tucker to send Mr C a letter by email that day. Mr C said that he would go to Mr A's workplace at 9 o'clock the following morning to inform the staff what was happening.

[22] On 17 and 18 April 2013, Ms Tucker sent letters to Mr C asking for clarification on whether Mr A was suspended and confirming that he was available and willing to work. She drew Mr C's attention to clause 19.1 of Mr A's employment agreement which allowed him to be suspended while an investigation was carried out into alleged misconduct. However, she stated that she understood that Mr A had not been fully informed of B Ltd's concerns and asked for clarification. Ms Tucker also stated that there did not appear to be any clear disciplinary process followed particularly since Mr C had clearly said that neither of the two meetings he had had with Mr A were disciplinary meetings.

[23] On 18 April 2013 in the afternoon, Mr C rang Mr A. He asked Mr A if he was available for a meeting in person or over the phone straight away. Mr A said he did not understand why Mr C wanted an urgent meeting and Mr C told him that he needed to have a meeting with him as soon as possible to tell him B Ltd's decision. Mr A

told Mr C that he was expecting a visitor shortly and therefore could not meet with him in person and asked that he tell him what he had to say over the telephone. Mr C told Mr A that he was being dismissed, effective immediately, for not filling out the application form correctly by not mentioning the criminal offences.

[24] Mr C wrote to Mr A confirming the dismissal decision:

*When you applied for employment with [B Ltd] the Employment Application form completed and signed as true and correct by you on 24 April 2007 included the question "Have you ever been convicted of a Criminal Offence", you circled the "No" answer.*

*We have subsequently discovered you had in fact been charged, convicted and spent time in prison for what are regarded as serious offences.*

*Had that information and the nature of the charges been disclosed at the time of application we would have not offered you employment.*

*Your application was signed by you as a true and correct response to the questions contained in the Application Form but was in fact untrue and incorrect and that materially affected our decision at the time.*

[25] Mr A was paid one month's notice by B Ltd from 19 April to 19 May 2013.

[26] Mr A's depression worsened and he applied for the sickness benefit. After a stand down of 12 weeks, he was granted the sickness benefit which he remained on until he obtained new employment on 17 October 2013.

[27] In evidence prepared for the investigation meeting Mr C said that Mr A's failure to disclose his convictions meant that he had lost trust and confidence in Mr A. In addition, the nature of the convictions was greatly at odds with the *values and culture* [B Ltd] *promotes and supports* which are *family values and culture*. Mr C did not feel that B Ltd could continue to engage Mr A in a senior role with a great amount of autonomy, with *control, authority and influence over a number of staff* and with a great deal of public contact.

## **Determination**

[28] Whether or not the dismissal of an employee is justified must be determined by the Authority on an objective basis by considering 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 occurred.<sup>3</sup>

[29] When applying that test, the Authority must consider a number of factors specified in s.103A(3) of the Act. It may additionally consider any other factors it considers appropriate. The required factors are:

- (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[30] The Act provides that a dismissal must not be determined to be unjustifiable solely because of defects in the process followed by the employer, if the defects were minor and did not result in the employee being treated unfairly.

[31] Mr A was upset that the letter addressed to him outlining his convictions had been seen by at least three people at B Ltd. He made a complaint to the Privacy Commission. However, his concern over what he considers a breach of his privacy is not a matter for the Authority to consider. Instead I must consider the decision and the decision making process of B Ltd at the time and in light of what it knew at the time. It is not relevant to my enquiry how the information about the convictions came to B Ltd's notice. I acknowledge that it is arguable that it should not have been revealed to it by the Police in light of Mr A's name suppression.

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<sup>3</sup> Section 103A of the Employment Relations Act 2000

[32] In addition, I have been asked to take into account that the Licensing Authority ultimately granted Mr A a Secondhand Dealers Licence, dismissing the Police concerns, stating as part of its reasoning for doing so:

*The applicant was last convicted of a serious offence in 1992. It is appropriate that his record since then should be recognised and that he should receive credit for having remained clear of major offences since then. In the opinion of the Licensing Authority, the fact that the applicant has led a conviction free life for such a long time supports the view that he has gained control of the impulses which had led to his offending.*

[33] No doubt the Licencing Authority's decision is the kind of decision Mr A hoped that B Ltd would make but B Ltd did not have the Licencing Authority's decision when it decided to dismiss him so I do not take it into account as part of my s.103A enquiry.

*Was there substantive justification for the dismissal?*

[34] Ms Tucker submits that B Ltd did not have substantive justification for dismissing Mr A. When a dismissed employee contends that his dismissal was unjustifiable the employer must be able to prove, on the balance of probabilities, that the decision and how that decision was reached were what a fair and reasonable employer could have done in all the circumstances.

[35] Mr Wilson was clear in his submissions that B Ltd does not rely on the Contractual Remedies Act 1979 to cancel Mr A's contract of employment but on the his dishonesty in concealing his convictions having led to the destruction of the basic confidence and trust that is essential to an employment relationship.

[36] Mr Wilson submits that the Employment Court case of *Tai v Robinson (t/a Coronation Lodge Rest Home)*<sup>4</sup> should be applied to find Mr A's dismissal justified. In that case Ms Tai applied for a job as a caregiver at a rest home. On the application form she was asked whether she had been convicted in a court in the past 10 years and whether she was currently facing any criminal charges. She answered "No" to both questions. She signed a declaration that the answers to her questions were true and correct, that the information she had given would be part of her employment agreement and that any subsequently discovered false information might result in her dismissal.

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<sup>4</sup> [2004] 1 ERNZ 270

[37] Ms Tai had been convicted of assault twice by the time she applied for the job. However, that was not discovered until after she was employed. Ms Tai was a duty leader on the night shift. About a month after she started work there were some resident complaints about Ms Tai and the Robinsons were informed that Ms Tai had convictions for assault.

[38] Judge Shaw decided the question about convictions:

*...was a legitimate question to be asked and, in light of the nature of the defendants' business, one that was necessary for the purpose. Staff in rest homes deal with a very vulnerable section of society. Apart from their professional qualifications, staff must also be absolutely trustworthy and free from any tendency to violent behaviour. It is reasonable to expect that a revelation of a prior conviction for dishonesty or violence would be very influential in the decision of whether to employ or not. ...*

*Ms Tai's denial of any convictions had two consequences. First, it deprived the defendants of an opportunity to make inquiries into the nature and circumstances of her convictions. It also deprived Ms Tai of the opportunity of explaining the background to the convictions with a view to persuading the defendants to employ her in spite of them.*

*Without such an explanation the defendants were entitled to be worried about a propensity for violence.*

*Secondly, it was a lie. Ms Tai was not honest in her response and the discovery of that by the defendants at such a late stage inevitably undermined their trust and confidence in her.*

*I reach the inescapable conclusion that the defendants were substantively justified in dismissing Ms Tai by reason of her false declaration.*

[39] There are a number of other cases in which a failure to honestly disclose information the employer relied on in its decision to employ were held to justify dismissal. Mr Wilson referred me to an Employment Court decision *Murray v Attorney-General*<sup>5</sup> and to an Authority decision *Bourne v Carter Holt Harvey Limited*<sup>6</sup>.

[40] In the *Murray* case the Court held that there is no general duty on a prospective employee to reveal material information voluntarily but if an employer asks and the [prospective] employee chooses to answer, that answer must be honest and

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<sup>5</sup> [2002] 1 ERNZ 184

<sup>6</sup> [2011] NZERA Auckland 18

full.<sup>7</sup> In that case during the early stages of their employment with the IRD Mr and Mrs Murray pleaded guilty to benefit fraud charges. The Court held that the IRD had:

*... repeatedly laid down the ground rules for acceptability of applicants for employment and the plaintiffs, by carrying on and by the various papers that they signed, must be taken to have agreed to those ground rules. These were that they should not have recent (meaning within 10 years) convictions for offending and they must not be defaulters under various aspects of the revenue system. It was even contemplated that the criminal record check might not be completed until after the employment began, in which case if the check was unsatisfactory the employment would be ended at once and the plaintiffs must be taken to have agreed to that condition as well.*

...

*It was made abundantly clear to the plaintiffs that their positions were of high trust and which had to be perceived of by the outside world as being positions of high trust and complete discretion. ...*

*The difficulty for them was and is that they underwent convictions and, on their own admissions, have been guilty of behaviour which they knew disqualified them from their employment. These were the very things of which they were informed in advance they must not be guilty of if they wanted to come and work for the defendant. One of the generally unacceptable convictions listed as such as a conviction under s127 of the Social Security Act ... The plaintiffs pleaded guilty to this very offence (and to fraud under the Crimes Act 1961).*

[41] In both the *Murray* and the *Tai* cases the types of criminal offending committed by the employees were directly relevant to the type of work done by them. If an employer had known Ms Tai had a propensity for violence that propensity, and the recency of her offending, would have been material to the employer's decision of whether it could trust her to work with its vulnerable clients especially in light of the fact she was employed in a sole charge position.

[42] In the *Murray* case the Murrays were both well aware that their offending, of dishonesty for personal gain, was of the kind that would never be acceptable in an IRD employee.

[43] In the *Bourne* case Mr Bourne also wrongly stated in an application form that he had not been convicted of a criminal offence. In fact he had five convictions, the last being about six years before his application for employment with Carter Holt. At least one conviction was for an offence of dishonesty and one was for wilful damage. He knew that a criminal record check would be made and signed a declaration acknowledging that the provision of false information would be grounds for dismissal.

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<sup>7</sup> Ibid, at paragraph [44]

The employment agreement also said it was conditional on his answering questions about his criminal history truthfully.

[44] Mr Bourne was engaged as a forklift driver and a couple of weeks later his criminal record was received by his employer. The Authority held that the employer was justified in dismissing Mr Bourne in part because it had made his continued employment conditional on a criminal record that lined up with his application form disclosure.

[45] In all three cases the employer had informed the employees that any subsequently discovered false information given by them could be grounds for dismissal and the employees had agreed in writing that they understood that. Another common factual aspect is the relatively short period of time Mr and Mrs Murray, Ms Tai and Mr Bourne had been employed for by their respective employers and the comparative recency of their convictions.

[46] In contrast:

- (a) B Ltd did not undertake a criminal record check;
- (b) did not make the retention of Mr A's employment conditional on any subsequently discovered false information given by him;
- (c) the convictions were uncovered after six years of otherwise satisfactory, even good, service; and
- (d) the convictions were between 15 and 17 years old when Mr A filled in the application form and were over 20 years old when they were discovered.

[47] Mr C's evidence is that B Ltd is a well-known brand whose customers are often families. Mr C says that the nature of Mr A's convictions alongside the fact that he lied on his application form mean the necessary trust and confidence B Ltd needed in Mr A had been broken.

[48] It is clear that the nature of Mr A's criminal offending is abhorrent to most people in society, and there can be no criticism of Mr C or Mr D being horrified and shocked when they discovered that Mr A, whom B Ltd had employed for about 12.5 years by then, had committed such offences.

[49] However, in the Court of Appeal case of *Smith v The Christchurch Press Company Ltd*<sup>8</sup> Justice Gault stated that there must be a sufficient nexus between an employee's out of work conduct and his employment<sup>9</sup>:

*... there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts on the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.*<sup>10</sup>

[50] B Ltd considers Mr A's offending had a material link to his work. However, it is difficult to conclude that the nature of Mr A's convictions<sup>11</sup> was intrinsically related to his employment and made it less likely his employer could rely upon him to undertake his duties well and diligently without risk of a repetition of his criminal behaviour. If the convictions had been ones for dishonesty there would have been a clear and direct link to the kind of work Mr A undertook for B Ltd. Even in those circumstances I consider the period of time that had passed since the last conviction and Mr A's good work record with B Ltd could have been taken into account and weighed against the revelation of Mr A's historical offending. However, Mr A's offending was not of a nature intrinsically related to his work for B Ltd and was not of a kind that would make it less likely he could undertake his duties in a trustworthy manner.

[51] The only ground outlined by Justice Gault in *Smith* that Mr C relied on for the dismissal was an undermining of *the trust and confidence necessary between employer and employee*. For a fair and reasonable employer the aspect alleged to have undermined trust and confidence could only relate to Mr A concealing his convictions on the application form. That may have made it harder for B Ltd to trust Mr A's honesty.

[52] However, despite concealing his convictions Mr A had worked diligently from 2007 until 2012 when he was promoted. In the time he was engaged in that elevated role his branch had performed well. There had been no complaints about Mr A and

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<sup>8</sup> [2000]1 ERNZ 624

<sup>9</sup> Mr Smith's misconduct occurred during his employment in the lunch hour off the premises and was towards another current staff member.

<sup>10</sup> *Ibid*, paragraph [25]

<sup>11</sup> Leaving aside the drunk driving conviction which B Ltd says would not have rendered Mr A unsuitable for employment with it.

there had been no need for any disciplinary action in the period between 2007 and the discovery of his convictions in April 2013. There was no suggestion of his having been dishonest in any way other than concealing his previous convictions.

[53] Mr C's evidence that the trust and confidence between B Ltd and Mr A were destroyed is undermined by him allowing Mr A to remain in his role from 8 April, when he first raised his concerns with Mr A, for a full week until the afternoon of 15 April when he stood Mr A down on full pay.

[54] A fair and reasonable employer could not have considered that Mr A's historical offending would have an impact or a potential impact on B Ltd's business, or that Mr A's offending conduct was incompatible with the proper discharge of his duties, or that it could impact on B Ltd's obligations to other employees.

*Was there sufficient investigation?*

[55] Although there was not a formal investigation at the 8 April 2013 meeting Mr A admitted that he had been convicted of the offences listed by the Police. B Ltd was not as concerned with the drunk driving conviction, except insofar as it also appeared to have been concealed by Mr A when he filled in the 2007 application form.

*Did B Ltd adequately raise its concerns with Mr A before dismissing him?*

[56] Although Mr C and Mr E had verbally outlined B Ltd's concerns to Mr A on 8 April 2013 it was not completely clear to him exactly what the allegations were, other than not being truthful on his 2007 application form. Mr E had told Mr A that *all things being equal* the objection to the Secondhand Dealers Licence could be overcome. But there was no detail given to him about what *things* needed to be *equal*. In addition, Mr A was in no emotional state on 8 April 2013 to clearly understand what was being said to him about B Ltd's concerns.

[57] The specific concerns in Mr C's mind about Mr A's suitability to remain employed by B Ltd were not clearly laid out for Mr A. They were never put in writing. In addition, Mr A's evidence, which I accept, was that it was never clear to him between 8 and 18 April 2013 that his employment was in jeopardy. Ms Tucker had asked for clarification from Mr C about B Ltd's concerns but no clarification was provided before the dismissal.

*Did B Ltd give Mr A a reasonable opportunity to respond to its concerns before dismissing him?*

[58] Given that B Ltd's concerns, that of the seriousness and nature of the convictions, had not been adequately outlined to Mr A the answer to this inquiry must be 'No'.

*Did B Ltd genuinely consider Mr A's explanations before deciding to dismiss him?*

[59] Mr C and Mr E say that at the 8 April meeting Mr A said that he had been told by WINZ not to declare his convictions. In evidence before the Authority Mr A also said that he had been told by WINZ that he only had to disclose convictions that had occurred between 7-10 years ago and that he did not have to disclose historical convictions. Mr A's understanding was mistaken; the Criminal Records (Clean Slate) Act 2004 would never have applied to Mr A's historical offending because he had been sentenced to prison. However, Ms Tucker submits that if a formal meeting had been held Mr A may have been able to put to B Ltd explanations of what steps he had taken to make reoffending of the nature of his 1990 and 1992 convictions less likely<sup>12</sup>. She submits that Mr A may have been able to convince B Ltd to retain him as an employee. In fact, in Ms Tucker's letter of 17 April 2013 to Mr C she wrote:

*To the extent that you allege that there has been a misrepresentation it does not affect his work performance or provide any risk factors around his work. Mr [A] has had no recent convictions and certainly no convictions of a similar nature to those previously disclosed in 1992 – over 20 years ago. Mr [A] is at pains to point out he has a (sic) successfully rehabilitated, has a successful support network in place, and has successfully worked for you for a number of years – a matter he is very proud of.*

[60] There was no response to Ms Tucker's letters and there is no evidence that Mr C took into account the factors set out by her above.

[61] Mr C's desire for haste compromised the fairness of the process for Mr A. B Ltd's defects in the process were more than minor and were disadvantageous to Mr A.

[62] After carefully considering all of the evidence I am also concerned that Mr C reached the decision that the only possible outcome was dismissal relatively early in the process, more likely by the time he stood Mr A down, and certainly without giving Mr A an opportunity to have his say.

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<sup>12</sup> For example a letter from Mr A's counsellor was provided to the Authority.

[63] I conclude that a fair and reasonable employer could not have dismissed Mr A in all the circumstances at the time the decision to dismiss was made. Therefore, Mr A has a personal grievance of unjustified dismissal and may be entitled to remedies.

### **Remedies**

#### *Lost wages*

[64] Section 123(1)(b) of the Act allows me to provide for the reimbursement by B Ltd of the whole or any part of wages Mr A lost as a result of his grievance. Section 128(2) of the Act provides that I must order B Ltd to pay Mr A the lesser of a sum equal to his lost remuneration or to 3 months ordinary time remuneration.

[65] Mr A did not obtain employment during the three months after his dismissal. I am satisfied that he did not earn income from employment during that time. Instead he applied for the sickness benefit in April 2013 but was not eligible to be paid it for a period of 12 weeks due to the amount of his final pay, which included a month of pay in lieu of notice and payment for accrued annual leave.

[66] Section 124 of the Act requires me to consider whether Mr A contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly.

[67] Mr Wilson submits that a fair process used by B Ltd would have inevitably led to Mr A's justifiable dismissal in any event and therefore that any deficiencies in B Ltd's process could not have caused Mr A's lost income. He also submits that Mr A's conduct should give rise to a finding of 100 percent reduction in any remedies because Mr A contributed totally to his dismissal by having such serious convictions and knowingly concealing them.

[68] I consider that a fair process may well have led to Mr A's dismissal in any event. However, I do not consider that would necessarily have been a justifiable dismissal.

[69] Since Mr A's only income from the date of his dismissal until he obtained further employment on 17 October 2013 was a sickness benefit I need to consider whether his need for the sickness benefit was caused by his unjustified dismissal. I also need to take into account whether Mr A adequately mitigated his loss.

[70] Mr A's evidence was that he had been being successfully treated for depression since about 1990. On 7 July 2013 Mr A's GP wrote:

*[Mr A] has been under my care for many years and prior to the recent employment issues had been quite well in himself with his health conditions well controlled. His last health review had been on 5/4/13 and there were no significant issues at that time.*

*We were contacted on 8/4/13 and [Mr A] was seen as an urgent appointment as he was in crisis following the events that had occurred at work. ...*

*He has had appointments with me on 9/4/13, 16/4/13, 19/4/13, 30/4/13, 15/5/13, 24/5/13 and his last appointment was on 21/6/13.*

*It has been clear that his anxiety levels have been very high with frequent panic issues. He has had reduced mood and sleep disruption and has been taking anxiolytic medication regularly to keep his anxiety controlled. He is also on antidepressant medication ...*

*The impact on [MrA] from these recent events has been significant with regards to his mental health ...*

[71] On 27 June Mr A's counsellor wrote:

*I have been seeing [Mr A] for counselling for the past four years. During this time ... [Mr A] has gone to great lengths to understand the cause behind his criminal conviction twenty years ago. He has managed to put in place good healthy strategies to support himself and I believe this is the reason there has been no reoffending in the past twenty years. ...*

*However, over the past two months, I have become increasingly concerned about [Mr A's] mental health as a result of the stresses he is experiencing from the sudden loss of his job and the financial and emotional impact this has had on him.*

[72] Mr A says that he was very distressed about his dismissal and felt *for the second time in my life I was about to lose everything over the same matter.*

[73] I consider that the deterioration in Mr A's mental health was due to his unjustified dismissal. I accept his evidence that despite his depression and anxiety he applied for 10-15 jobs before becoming employed in October 2013. I consider that Mr A acted as much as possible to mitigate his loss.

[74] Putting consideration of Mr A's possible contribution to one side for the moment B Ltd must pay Mr A 3 months (13 weeks) gross of his usual wages to 18 July 2013, less the month's notice that it paid him. Mr A calculates that for one week he was usually paid \$937.44 gross.

*Compensation*

[75] There is considerable evidence of the effect of the loss of Mr A's job and the events leading up to it on Mr A's mental health so much so that without more I would consider \$12,000 to be appropriate compensation for Mr A's humiliation, loss of dignity and injury to his feelings. However, B Ltd's liability to pay such compensation must be reduced by the portion of Mr A's fear and anxiety, embarrassment and humiliation that were attributable directly to his offending being revealed.

[76] Mr A's anxiety began with his discovery that the Police would be consulted about his application for the Secondhand Dealers Licence. As a result of being informed of that Mr A requested the Licencing Authority to send any further correspondence to his home address. His anxiety about what the Police might reveal about his convictions and what that might mean for him, particularly if his convictions were revealed and the inevitable embarrassment and shame when they were revealed were not caused by B Ltd's actions but were a direct result of Mr A's offending. That being the case I consider a fair amount of compensation for Mr A to be \$9,000.

*Contribution*

[77] Mr A did contribute to the situation giving rise to his personal grievance by not disclosing that he had previous, historical convictions. However, I do not agree that his contribution was such as to reduce his entitlement to remedies by 100%. Mr A disclosed at the investigation meeting that the advice given to him by WINZ was given in about 1992, on his release from prison. In the intervening time he had some responsibility to find out what his responsibilities were in relation to reporting his convictions to employers, when asked. The Clean Slate legislation does not apply to his offending. However, he did not make further enquiries to ascertain his responsibilities when applying for jobs.

[78] I am not convinced that if Mr A had disclosed his offending in 2007 that B Ltd would not have appointed him to the position he obtained. Mr A's evidence was that since his dismissal the B Ltd manager who hired him in 2007 told him that he would still have appointed him had he known of the convictions. That evidence is in contrast to what Mr C said.

[79] I consider that it is appropriate that Mr A's remedies are reduced by 25% to reflect his contribution to the situation giving rise to his personal grievance.

[80] That means that B Ltd should pay Mr A \$6,750 compensation and Mr A's lost wages for 13 weeks to 18 July 2013 reduced by 25%. I am confident that the parties will be able to work out the appropriate figure to pay Mr A; however, if agreement is not possible Mr A may come back to the Authority to set the amount of lost wages to be paid.

### **Costs**

[81] Costs are reserved. Mr A is legally aided. Any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011. The parties are encouraged to agree costs between themselves. However, if that is not possible, Mr A has 28 days from the date of this determination to make an application for costs to the Authority and B Ltd has a further 14 days to respond.

Christine Hickey  
Member of the Employment Relations Authority