

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5077890
AA 219/07

BETWEEN BLAGOJA PANOVSKI
 Applicant

AND MARINE TRIMMERS & ALL
 AWNINGS LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: Blagoja Panovski, in person
 Evan Steers, advocate for respondent

Investigation Meeting: 27 June 2007 at Auckland

Determination: 26 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Blagoja Panovski says he was unjustifiably dismissed by his former employer, Marine Trimmers & All Awnings Ltd (“MTAAL”).

[2] MTAAL employed Mr Panovski as a canvas fabricator and marine trimmer, which is a skilled position.

[3] According to a letter of dismissal dated 15 January 2007, and the statement in reply filed in the Authority, MTAAL dismissed Mr Panovski for poor performance, justifiably in its view, and now doubts Mr Panovski had the skills he represented he had when he was recruited for the position. However in oral evidence the managing director, Evan Steers, expressed some uncertainty about whether there was a dismissal at all.

The employment relationship

[4] As its name suggests, MTAAL is in the business of doing fabric fitouts and upholstery on boats, as well as providing fabric-based weather protection such as shade sails and awnings. Mr Steers engaged Mr Panovski in August 2006 on the strength of Mr Panovski's assertions about his relevant general background, and his particular skill in upholstery.

[5] According to Mr Steers, 'alarm bells' began to ring when he received a letter of complaint, dated 17 November 2006, about work done on a client's boat. The work involved re-covering seats and other re-upholstery on the boat, and the client was very dissatisfied with the result. He incorporated in the letter a series of photographs of the work complained about, with deficiencies pointed out. The complaints concerned the quality of the stitching, and of the finishing.

[6] At about that time, Mr Panovski's employment was due for the review to be conducted on the completion of three months' service. Eventually the review went ahead on 6 December 2006, and Mr Steers discussed the complaint with Mr Panovski during the review. He also made available a copy of the letter. His evidence was that Mr Panovski did not accept he had done anything wrong. Mr Steers also raised other concerns about the length of time Mr Panovski had taken to complete certain jobs, including the one complained about. He told Mr Panovski an improvement was required.

[7] There was an incident on or about 21 December 2006, in which Mr Panovski disputed the calculation of employees' holiday pay in respect of the Christmas-New Year shutdown period. Mr Panovski did not correctly understand the basis on which the holiday pay had been calculated, assumed it was wrongly calculated, and made the unreasonable allegation that Mr Steers was trying to cheat the staff. The problem was ironed out, but Mr Steers believed it affected Mr Panovski's attitude thereafter. Mr Panovski alleged his dismissal was connected with the incident, but I do not accept that.

[8] At the time Mr Panovski felt so strongly about the holiday pay issue that he used the internet to undertake some research into it. Although his agreed hours of

work began at 8 am, he chose to conduct that research on the morning of Friday 22 December 2006 and did not report for work until 9 am, after he had completed it. He did not advise anyone of where he was, or that he would be late. Mr Panovski's lateness meant Mr Steers was unable to give him instructions regarding a small piece of work to be done that day, before being obliged to depart to carry out his own work commitments. The client concerned expressed his dissatisfaction with the resulting failure to carry out the work.

[9] Another job already scheduled for Mr Panovski on 22 December was the delivery of re-upholstered squabs to a client's boat. Mr Panovski made the delivery, and was responsible for the re-upholstering. The next day the client visited Mr Steers at his home to complain about the quality of the work. The client was so dissatisfied that she sought repayment of a deposit and advised Mr Steers the company would not be retained to complete what was a relatively substantial amount of work on the boat.

[10] The MTAAL business was due to reopen on 8 January 2007. All of the staff, including Mr Panovski, were aware of that. Mr Panovski had decided, however, that he wanted to have a further week's leave because he always took that time off to spend with his family. He did not seek authority for the further week's leave, and nor did he advise Mr Steers of his intentions. It appears he mentioned to some work colleagues that he would be taking another week off, but that is not sufficient. When I asked Mr Panovski why he did not seek authority for the leave, he said it was 'my decision' and he 'always takes two weeks' leave in January'. That is not an acceptable attitude for an employee to take in respect of his workplace obligations.

[11] When Mr Panovski reported for work on 15 January 2007, Mr Steers was not expecting him. He had been informed of Mr Panovski's plan to take extra time off, but there had also been speculation on the part of Mr Panovski's colleagues that Mr Panovski would not return to work at all.

[12] Mr Steers was surprised to see Mr Panovski and said 'what are you doing here?' He then asked Mr Panovski to come into the office.

[13] There, he asked Mr Panovski where he had been and also raised the complaint about the squabs. Mr Steers said in evidence that Mr Panovski cut the discussion

short by saying 'OK, I go find another job'. Mr Panovski then left the building. Mr Steers said that at the time he was taken aback by Mr Panovski's appearance and confused about what was happening. For that reason he was now unsure of whether he dismissed Mr Panovski at all.

[14] Mr Panovski said Mr Steers told him 'you are no longer working here'. He took that as a dismissal.

[15] Although he said he had no recollection of doing so, I consider it likely Mr Steers made a statement of that kind. Against the background I have described it is conceivable the statement reflected a view that Mr Panovski had abandoned his employment. Mr Steers would, even so, have been obliged to reconsider the company's position in the light of Mr Panovski's reasons for his absence and explanation of the failure to advise of it. If he failed to act fairly, Mr Panovski could still have had a personal grievance.

[16] At the time, however, Mr Steers made a file note in which he recorded:

"I told Bob that I was terminating his employment in terms of para 38 and 40.6 of his contract. I related the issues over the ... job and said it represented a serious offence in terms of substandard work."

[17] By letter to Mr Panovski also dated 15 January 2007 Mr Steers said:

"I believe your skills are not up to the standard required for this industry, and this is impacting on the financial viability of the company. As a result your employment is terminated ..."

[18] The statement in reply also alleged there had been a justified dismissal on the ground of poor performance. In the face of that kind of material it is difficult for Mr Steers to now assert an uncertainty over whether there was a dismissal. There was a dismissal, imposed for the reason set out in the documents to which I have referred.

Justification for the dismissal

[19] The following is a summary of the basic requirements of fairness on the part of employers who are contemplating dismissing an employee on the ground of poor performance:

“[23] ... Just as with misconduct, the employer must carry out a fair investigation with full participation in it by the employee. Having done that, the employer is then entitled to come to a decision whether the employment of the employee is going to be continued, provided always that the employer has not only followed a fair procedure during the investigation of the complaints about the employee but has also previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which are objectively measurable and have been objectively measured.”¹

[20] Mr Steers did draw to Mr Panovski’s attention certain concerns about his performance during the discussion in December 2006. However it appears that was in the context of a general review of the first three months of Mr Panovski’s employment. There was no suggestion the discussion occurred in the context of a formal process of performance management, with disciplinary action as a possibility. The outcome was merely that there would be another review in three months. That is not the same thing as a formal warning that dismissal may follow if the required improvement is not demonstrated. Moreover there was no specific indicator of what kind of improvement was required, or how any improvement would be measured or achieved. I was not asked to find, and nor would I find, that such a process adequately met the requirements set out above.

[21] There were further expressions of dissatisfaction with Mr Panovski’s work after the December meeting, but the only major complaint seems to be the one conveyed on 23 December by the client in person. That complaint was not discussed in any proper way with Mr Panovski before his dismissal.

[22] Indeed the discussion of 15 January 2007 did not meet the basic requirements of a fair procedure in that Mr Panovski was not warned his employment was in jeopardy, and although he was made aware of the 23 December complaint he did not receive an opportunity to respond to it. The exchange was probably undermined fatally by Mr Steers’ belief that the employment relationship had ended anyway, so

¹ **Ramankutty v Vice Chancellor of the University of Auckland**, 25 October 2001, AC 53B/01

that he had not prepared for the kind of discussion necessary if he sought to raise Mr Panovski's performance in a disciplinary context. Instead of confirming a dismissal in the reactive way he did, he should have taken the time to arrange a proper meeting and returned to address the problem in a considered way.

[23] As a result, Mr Steers' actions were not those of a fair and reasonable employer in all of the circumstances and at the time. For that reason I conclude the dismissal was unjustified and Mr Panovski has a personal grievance.

Remedies

[24] Mr Panovski is entitled to reimbursement of the remuneration lost as a result of his personal grievance. He has obtained new employment, and sought the reimbursement of three months' lost remuneration.

[25] However there was significant contributory fault on Mr Panovski's part, and I take that into account to reduce the amount I would otherwise have awarded.

[26] The two main complaints in particular were discussed in some detail at the investigation meeting. Mr Panovski's primary response to the allegations of poor workmanship was to blame his tools. I do not consider that an adequate explanation on the part of someone with the experience Mr Panovski claimed. For example the machinery he used may have been older than he was used to, but that is not sufficient to explain the poor sewing and finishing of which clients complained. As for the quality of his workmanship on the re-upholstered squabs, he blamed the age of the squabs and the effect of the client's sitting on them. Again that was not a convincing response from someone claiming to be experienced in that kind of work.

[27] MTAAL is therefore ordered to reimburse Mr Panovski for lost remuneration, reduced by a factor of 50%. The resulting sum is \$4,225.

[28] Mr Panovski also sought compensation for injury to his feelings as a result of the personal grievance. Taking into account the evidence on the point and the contributory conduct, I order MTAAL to compensate Mr Panovski for injury to his feelings in the sum of \$1,000.

Costs

[29] Costs are reserved. If the parties seek a decision from the Authority about whether one of them should receive a contribution from the other to the costs associated with bringing this matter to the Authority, they are to file and exchange written statements of their position within 28 days of the date of this determination.

R A Monaghan

Member of the Employment Relations Authority