**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 154/08
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| | BETWEEN | NICHOLAS BETTANY<br>Applicant |
| | AND | MASONRY DESIGN SOLUTIONS LTD<br>Respondent |

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| Member of Authority: | Yvonne Oldfield |
| Representatives: | Doug Cowan for Applicant<br>Paul Wickes for Respondent |
| Investigation Meetings: | 4 December 2007, 15 February 2008. |
| Submissions received: | 21 February 2008 from Applicant<br>18 February and 25 February 2008 from Respondent |
| Determination: | 24 April 2008 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In mid 2006 Mr Bettany applied for a position as an architectural draughtsperson with the respondent, Masonry Design Solutions Ltd ("Masonry Design". After two interviews, Mr Bettany was offered a position for a fixed term of three months. The reason for the fixed term was expressed in the employment agreement as follows:

*"Masonry Design Solutions Ltd are evaluating future business requirements with the intention of permanent, full time employment."*

[2] Masonry Design Solutions was a small business. At the time of Mr Bettany's interview, apart from managing director Mark Wilson and his wife, who was also a director, it employed a draughtsperson and an administration manager. Mr Wilson had previously had two full time staff doing drafting work but one had left some months

beforehand. This person was not immediately replaced because a downturn was predicted in the construction industry. However, workflows had not dropped as anticipated. Mr Wilson decided to employ another person on a temporary basis while he established what further work would be available. Mr Bettany accepted the position on the terms offered, signed his employment agreement and started work on 4 September 2006.

[3] Mr Wilson told me that towards the end of the three month fixed term it was clear that there was plenty of work coming in to the business. Because of this, on 17 November, he met with Mr Bettany to tell him that he was making the position permanent. His evidence was that he also told Mr Bettany that if his timekeeping and work output improved, the job would not be advertised and he would be kept on.

[4] Mr Wilson says that instead, over the next couple of weeks, he saw Mr Bettany's performance slip further. He also became aware of a level of internet use by Mr Brittany which he felt amounted to "gross misconduct." He met with Mr Bettany on 29 November and put all his concerns (erratic timekeeping, low work output, and excessive internet use) to Mr Bettany. He was not satisfied with Mr Bettany's response and later that day, dismissed him without notice.

[5] Mr Bettany's recollection of the discussion of 17 November differs in one important respect: he says he was confirmed unconditionally in the permanent role. Although he does not dispute that Mr Wilson discussed his timekeeping and work output with him he told me that the tone of the meeting was positive and he did not get the impression that these issues were "*a huge concern*" for Mr Wilson. He says he had no advice prior to 29 November that his employment could be in jeopardy, and that none of the matters raised on that day amounted to serious misconduct. He says therefore that the dismissal was procedurally and substantively unjustified.

[6] In closing submissions Mr Bettany's representative replaced an earlier raft of claims, including one for reinstatement, with the following:

i. $10,000.00 compensation for hurt and humiliation;
ii. three months lost earnings, based on an annual salary of $55,000.00 less actual earnings from temporary work in January and February 2007;

iii. outstanding holiday pay, and

iv. costs.

[7] Mr Wilson does not rely on the existence of the fixed term as a defence, rather he says that his concerns had substance and justified dismissal. The respondent also counterclaims against Mr Bettany. After the dismissal, Mr Wilson told me, he found it necessary for much of Mr Bettany's work to be redone. He also says that he discovered that Mr Bettany had used a mobile phone supplied by the respondent to make unauthorised personal toll calls. The respondent's counterclaims (also revised during the course of the Authority's investigation) are for:

i. damages of $18,000.00 in relation to remedial work, and

ii. $109.37 for personal toll calls.

**Issues**

[8] The issues for determination are therefore:

i. Whether the termination of Mr Bettany's employment was justified;

ii. Whether there were breaches of duty on Mr Bettany's part which caused losses to the respondent and what if any damages are owed as a result, and

iii. If a personal grievance has been made out, to what extent Mr Bettany's actions contributed towards the situation that gave rise to it and what if any remedies he is entitled to.

**(i) Was the termination of employment justified?**

[9] At the meeting of 17 November Mr Bettany responded to Mr Wilson's concern about output by reminding him that when he came to the respondent he had been new to masonry construction work and to the particular drafting software the respondent used. He said however he felt that he was now more familiar with both and that his output was improving. Regarding timekeeping, Mr Bettany (who was paid on an hourly basis) assured Mr Wilson that he would "*get his hours up*."

[10] By his own account, Mr Wilson felt confident from Mr Bettany's responses that he would make an effort to meet the standards he required. He went on to tell Mr Bettany that as a permanent member of staff he would have to give up freelance work. Mr Bettany assured him that he would do so straight away. Mr Wilson also told Mr Bettany that he could expect a Christmas bonus of a night at a hotel. Mr Wilson told me that the tone of these discussions was informal and positive.

[11] I am not satisfied that Mr Wilson told Mr Bettany that the permanent position was conditional on improvement. It was reasonable for Mr Bettany to think (as he says he did) that Mr Wilson was satisfied with his responses to his concerns and was making him an offer of permanent employment, with a Christmas bonus, on the sole condition that he give up freelance work. Mr Bettany signalled his acceptance of the offer by his assurance that he would immediately give up that work.

[12] The termination of employment on 29 November amounted therefore to the termination of permanent employment, rather than early termination of fixed term employment. It now falls to be considered whether that termination was justified.

[13] Mr Wilson told me that in the week after the meeting of 17 November Mr Bettany's timekeeping and work output became markedly worse. On the evening of 27 November Mr Wilson went through the computer Mr Bettany worked on and found that over the previous 12 days Mr Bettany had visited 900 different internet or email addresses during work hours. Mr Wilson said this far exceeded the use of other employees and was, he felt, well outside what the employment agreement provided for, which was as follows:

*"12.4* ***Use of Internet and Email***

*The Employee will have access to email and the Internet in the course of their employment. The Employee shall ensure that at all times their use of the email and Internet facilities at work meets the ethical and social standards of the workplace. Whilst a reasonable level of personal use is acceptable to Masonry Design Solutions Ltd, this must not interfere with the Employee's employment duties or obligations, and must not be illegal or contrary to the interests of Masonry Design Solutions Ltd…"*

[14] On the morning of 29 November Mr Wilson requested Mr Bettany to attend a meeting in his office. Before the meeting started he told Mr Bettany that the meeting concerned serious employment related matters and could be delayed to another day if he wished to take advice or bring a representative. Mr Bettany however indicated that he wanted to proceed with the meeting. Mr Wilson put his concerns (poor timekeeping, high internet use and low output) to Mr Bettany and asked for Mr Bettany's response. Mr Bettany told Mr Wilson that his poor timekeeping was due to having a lot on his plate (he did not elaborate on what he meant by this.) He agreed that he had developed some bad habits of internet use.

[15] Mr Wilson told Mr Bettany that he was not happy with these responses and adjourned the meeting to consider what to do next. He talked it over with his wife and co-director, Linda Wilson, and decided that he could no longer have confidence in Mr Bettany. After an adjournment of about an hour he met again, briefly, with Mr Bettany and told him that his employment was being terminated with immediate effect.

[16] The respondent says that this dismissal was procedurally fair. Mr Wilson says that what he told Mr Bettany on 17 November about timekeeping and work output was a clear warning that if Mr Bettany did not address these matters, his job was in jeopardy. He says that despite this warning both areas of performance got markedly worse over the very next week. As for the internet use, Mr Wilson acknowledges that this was raised with Mr Bettany for the first time on 29 November, but argues that it was so excessive that it amounted to gross misconduct justifying summary dismissal in itself.

[17] I reject the assertion that on 17 November Mr Bettany was warned, and for the same reason that I rejected the assertion that Mr Wilson made the offer of a permanent job conditional on performance improvements. Mr Wilson did raise his concerns with Mr Bettany but failed to make it clear that his job was in jeopardy if they were not remedied.

[18] I also reject the assertion that Mr Bettany's level of internet use amounted to serious misconduct. The employment agreement provided as follows:

***"14.2 Termination for Serious Misconduct***

*Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes but is not limited to:*

i. *Theft;*
ii. *Dishonesty;*
iii. *Harassment of a work colleague or customer;*
iv. *Serious or repeated failure to follow a lawful instructions;*
v. *Deliberate destruction of any property belonging to the Employer;*
vi. *Actions which seriously damage the Employer's reputation."*

[19] Although this list is not exhaustive, it identifies a type of conduct which is fundamentally destructive of the employment relationship. In contrast, establishing what is a reasonable level of internet use, and ensuring that this level is not exceeded, are performance matters and should be handled accordingly. Although I accept that Mr Bettany's internet use was excessive (and will return to that topic under the heading of contributory conduct) I consider it should have been the subject of a warning and opportunity to rectify the behaviour.

[20] The respondent's failure to warn Mr Bettany that a failure to improve would place his job in jeopardy renders the termination of his employment procedurally unfair and hence, unjustified. I will discuss the substance of the reasons for dismissal under the heading of contributory conduct.

**Counterclaims**

[21] In support of the claim for damages the respondent produced several sets of drawings said to have been so poorly drafted by Mr Bettany that they all had to be redone from scratch. Mr Ebbett (the respondent's other full time draughtsperson) told me that the original drawings were so full of errors that trying to fix them would not have eliminated the risk of exposing the respondent to liability for faulty work. Mr Wilson had agreed.

[22] Mr Bettany accepted that he created most, although not necessarily all, of the drawings attributed to him. He agreed that the work was not of acceptable standard, but said that it had been his expectation that it would be checked. He also challenged the necessity for the work to be completely redone, saying that it would have been feasible (and quicker) for the existing drawings to be corrected.

[23] A considerable part of the Authority's investigation was taken up in going through Mr Bettany's drawings and Mr Ebbett's replacements (shown to me by way of comparison.) It suffices to say here that even to the eyes of a layperson, the work Mr Bettany produced was obviously, consistently, and unacceptably shoddy. I accept that the responsible course of action was for the drawings to be completely redone.

[24] In making its claim for damages for the work that had to be redone the respondent relies on clause 12.4 (set out in paragraph [13] above) as well as the following provisions of the employment agreement:

***"4.2. Obligations of the Employee***
*The Employee shall …*
*(ii) perform their duties with all reasonable skill and diligence…*

and

***11.3*** *During normal working hours Employees shall devote the whole of their time, attention and abilities in carrying out their duties.*

***11.4*** *Employees shall carry out their duties well, faithfully and diligently, providing the Employer the full benefit of the Employee's experience and knowledge."*

[25] The respondent says that the errors found in Mr Bettany's work establish breaches of the obligations set out in these provisions. Mr Wickes notes that some of the substandard work was completed during periods of high internet use by Mr Bettany and suggests it can be inferred that this interfered with Mr Bettany's performance of his duties.

[26] In *Medic Corporation Ltd v Barrett (No2) 1992 3 ERNZ 977*, at p. 983 the Court noted:

*"The law places limits on the consequences that may be laid at the door of a defendant. They must be consequences of which it can convincingly be said that they are the result of the defendant's conduct, in the sense that they would probably not have ensued but for the defendant's conduct. And they should be such consequences as would be apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct. They must be consequences that are sufficiently proximate. They must not be too remote."*

[27] In order for a claim for damages against an employee to succeed, therefore, three elements must be present. First there must have been conduct by the employee in breach of the employment agreement. This was easily made out on the evidence before me. I am satisfied that Mr Bettany did not perform his duties with reasonable skill and diligence nor did he devote the whole of his time and attention to carrying out his duties.

[28] Second, that conduct must have caused loss to the employer. Again, this is accepted although I note that I do not accept the approach Masonry Design has taken to the calculation of damages. Mr Ebbett told me it took him 150 hours to complete the new drawings and Mr Bettany confirmed that this was a reasonable timeframe for the work. Based on a charge out rate of $120.00 per hour (again, accepted by Mr Bettany) the respondent says that its losses were $18,000.00. However this figure represents the potential revenue to be generated from Mr Ebbett's work, not a cost to the company. It is chargeable to the client. Mr Ebbett told me that there was an opportunity cost arising out of having to redraw Mr Bettany's work because the company could not charge his time out for other work, but the respondent did not produce evidence of any such lost opportunities. I have concluded that the actual loss established by the evidence is the cost of Mr Bettany's labour (which could not be passed on.) Mr Bettany worked for a period of twelve weeks at 39 hours a week on average. His hourly rate was $27.50. In total he received just under $13,000.00 gross. This is the extent of the proven loss to the respondent.

[29] The final element to be established is that the consequences of the breach would have been apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct. The test here is sometimes expressed by asking whether the employee engaged in the conduct in question knowing that it would cause loss to his or her employer.

[30] It is here that the counterclaim fails. It has not been established, in this case, that Mr Bettany engaged in the conduct complained of knowing that it would cause loss to the respondent. I am satisfied that Mr Bettany was unpunctual, sloppy, distracted, and slow in his work. I am not however satisfied that he realised that his work was so bad that it would need to be completely redone.

[31] The second counter claim succeeds however. In support of its claim for payment for personal phone calls the respondent produced its Telecom bills and was able to establish that Mr Bettany made lengthy personal calls to overseas numbers after hours. I am satisfied that this use was not authorised and accept that he is obliged to repay the cost of these calls to the respondent.

[32] **Mr Bettany is therefore ordered to pay to Masonry Design Solutions Ltd the sum of $109.37.**

**Contributory Conduct and Remedies**

[33] To substantiate his concerns about punctuality and internet use Mr Wilson produced to the Authority Mr Bettany's timesheets and internet use histories, as well as forensic records which provided further detail on the internet use. Daily start and finish times had been entered on the timesheets by Mr Bettany himself, who accepted the reliability of this evidence and that of much of the internet use history. Although he pointed out that it was possible that from time to time others might log on to his computer, he accepted that during the working day, most of the entries must have related to his use.

[34] I do not consider it necessary for me to go through this evidence in detail. Suffice to say that it established that on several occasions (including three in the final fortnight) Mr Bettany arrived at work well after ten and that he rarely completed a 40

hour week. It also showed that he visited what I consider to be an extraordinary number of internet sites during the working day, particularly in the last fortnight, after he had undertaken to increase his output. All of this information was known to both the respondent and to Mr Bettany at the time of his dismissal.

[35] Mr Bettany told me that at his interview it had been agreed that he could have flexible working hours and he did not understand himself to be tied to any particular time. He said he worked later than others to make up most of the time in question. Mr Wilson said what he agreed to was a late start time of 9.30. This is also what the employment agreement records. He noted that the rest of the staff started by 8.30 and because much of the drafting work was done on a team basis it was not desirable for one person to work very different hours from the others.

[36] Mr Bettany's position is that despite succeeding in negotiating a different start time to other staff, he was not bound by it. This is not credible. I do not accept that he had total discretion over his hours of work, as he asserts. I conclude that he was required to be at work by 9.30.

[37] As for the time spent online, Mr Bettany told me that much of this was in order to listen to news programmes as he worked. He said others in the office knew this. He acknowledged that he also frequently checked his personal email account and bids he made or received on *Trade Me* but said that he was able to do this very quickly so that it did not affect his work. He also said he had no idea at the time that (because of the type of plan the respondent was on) streaming large amounts of information was causing additional expense to the respondent.

[38] These explanations were not acceptable to Mr Wilson and they are not accepted by the Authority. I am satisfied that Mr Bettany's timekeeping was unacceptably lax, both before and after Mr Wilson raised his concerns with him on 17 November, that his internet use went beyond a "reasonable level" and that in the final fortnight of his employment his work output was adversely affected by his high level of internet use.

[39] Section 124 of the Employment Relations Act 2000 provides:

*"Where the Authority …determines that an employee has a personal grievance, the Authority…must in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-*

*a. Consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*

*b. If those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[40] In *Paykel & Ahlfeld [1993] 1 ERNZ 334* Travis J. identified three steps in applying section 40 (2) of the Employment Contracts Act 2000. That approach applies equally in respect of s.124. The first step has already been completed here: it has been established that Mr Bettany has a personal grievance by reason of being unjustifiably dismissed.

[41] The second requires the Authority to consider the extent to which Mr Bettany's actions contributed, not to the actual dismissal itself, but to the situation that gave rise to his grievance claim. I am satisfied that the Mr Bettany's actions contributed significantly to that situation. At the meeting of 29 November he accepted (but could not satisfactorily explain) his poor timekeeping, low output and excessive internet use. These actions, and Mr Bettany's failure to offer any explanation for them, caused Mr Wilson to lose confidence in him, which in turn led him to the decision to dismiss. Mr Bettany's actions clearly contributed to the situation which gave rise to the personal grievance.

[42] The third and final step requires an assessment of whether the Mr Bettany's actions were so blameworthy that remedies that would otherwise be awarded must be reduced. It is in relation to this third step that matters of procedural fairness become relevant (*Paykel* at p.339):

*"In carrying out this third step it would clearly be material whether or not the respondent had his failures pointed out to him and had been given the opportunity to improve his performance. If such warnings had been given and there had been no proper response, the Tribunal would be justified in finding a substantial level of contribution and reducing the remedies accordingly. If however the Tribunal found that, in the absence of such warnings, the respondent was entitled to assume that he*

*had been properly carrying out his duties, it would be equally free to conclude that his actions did not justify a reduction to any extent."*

[43] The situation in the present case falls somewhere between the two extremes identified here. As we have seen, Mr Bettany was not formally warned because he was not told his job was in jeopardy. He was however told (on 17 November) of specific areas where he needed to improve and responded by reassuring Mr Wilson that the matters in question had been or would be rectified. It cannot therefore be said that he was entitled to assume that he had been properly carrying out his duties prior to that. Then, unaccountably, his performance slipped still further over the next two weeks, and when challenged about this on 29 November he could not explain it.

[44] I am satisfied that Mr Bettany's conduct was blameworthy and that remedies should be reduced by a substantial margin. The respondent has already suffered heavy losses arising from Mr Bettany's poor work habits. Remedies are reduced by 50%.

[45] Despite requests from the Authority, scant details were provided of Mr Bettany's post-dismissal earnings. Mr Bettany told me that he was unemployed for the month of December and then obtained temporary work during January and February, from which he told me he thought he had earned "about $6,000.00." After that he said it was several months before he found permanent full time work, but he did not provide me with any evidence of attempts to mitigate his losses. I conclude that Mr Bettany lost five weeks wages, which on an hourly rate of $27.50 and for a 39 hour week worked amount to $5,362.50 gross.

[46] **After reducing this figure by 50% for contributory conduct I order the respondent to pay to the applicant the sum of $2,681.25 gross lost wages, plus holiday pay on this sum.**

[47] As for hurt and humiliation, Mr Bettany told me that he was surprised by his dismissal and that he was particularly upset because it was by then too late to recover the freelance work he had given up in reliance on the permanent position. In all the circumstances (and in the absence of contributory conduct) I would have considered an award of $5,000.00 to be appropriate under this head.

[48] **After making the necessary reduction pursuant to s.124 I order the respondent to pay to the applicant the sum of $2,500.00 compensation for hurt and humiliation.**

**Costs**

[49] This issue is reserved. If either party requires the Authority to determine the matter it should lodge a memorandum of submissions no later than 28 days from the date of this decision.

Yvonne Oldfield
Member of the Employment Relations Authority