

BETWEEN PAUL BRINKMAN
 Applicant

AND VERSATILE BUILDINGS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Paul Pa'u for Applicant
 Anne Toohey for Respondent

Determination: 5 June 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant Mr Paul Brinkman ("Mr Brinkman") claims he has personal grievances in relation to his suspension and dismissal. He also claims a bonus of \$9,500.00. Versatile Buildings Limited ("Versatile") denies Mr Brinkman's various claims. Mr Brinkman asks the Authority to resolve this employment relationship problem by making formal orders in his favour for reimbursement, compensation, a bonus and costs.

[2] Mr Brinkman was dismissed by letter dated 19 May 2006 sent to his lawyer. The letter materially stated:-

14. *The company no longer has trust and confidence in you given the seriousness of the situation. The company cannot allow you to continue to manage a Branch on the basis of your recent performance and attitude.*
15. *Accordingly, taking all matters into account that have been raised with you and discussed, the company has decided that you are to be dismissed immediately effective today.*
16. *You will be paid all outstanding remuneration, and I would ask that you return both your car and petrol card to the Branch no later than 5.00pm today.*

[3] Versatile's General Manager Mr John Allen ("Mr Allen") tells the Authority he considered the matters raised with Mr Brinkman amounted to serious misconduct. He says that he took into account Mr Brinkman's previous record with Versatile and his personal circumstances. He says that

in December 2005 he gave Mr Brinkman the benefit of the doubt in issuing him a final warning. But he also considered Mr Brinkman did not see the issues raised as having substance or being serious enough to justify a finding of misconduct. Mr Allen says it was clear to him that he could have no confidence that matters would change. He says he had no trust and confidence in Mr Brinkman to allow him to continue to manage a branch on the basis of Mr Brinkman's performance, attitude and serious misconduct.

[4] Since February 2003 Mr Brinkman was employed as Versatile's Auckland Branch Manager. He was employed under the terms of a written individual employment agreement dated 1 June 2005.

[5] On Thursday 13 April 2006 before Easter Weekend, Mr Brinkman was sent an email by Mr Allen directing him to attend a meeting the following week on Thursday 20 April 2006. The email stated:-

I apologise for sending this prior to a long weekend, however, I wanted to give you sufficient notice to organise yourself where possible.

1. *This letter is to advise you that I wish to meet with you next Thursday 19th April 2006 at 8.30am at Manukau Branch to discuss some concerns I have broadly with regard to your employment.*
2. *Recently some issues have arisen with regard to financial, customer relationships and management issues within the branch which I believe warrant some investigation.*
3. *At our meeting next week I want to discuss with you some particular issues that have arisen. You will not be required to respond to these issues at this meeting but will be given a further opportunity to provide your response.*
4. *I regret to advise that some of the issues I need to raise with you, if found to be substantiated, may be considered to be serious misconduct. If that is the case then a possible outcome of this process may be disciplinary action which may include dismissal. Obviously as this is only the beginning of this process I am keeping an open mind, however you should feel free to have a support person or representative with you.*
5. *I intend to bring another member of the Versatile management team to the meeting although who this might be has not yet been finalised. Please do not discuss this matter with other staff within the Auckland branch.*

*Yours faithfully
Versatile Buildings Ltd
John Allen
General Manager*

[6] Mr Brinkman sought details from Mr Allen but Mr Allen declined to elaborate further.

[7] Mr Brinkman attended the meeting on 20 April 2006 with his wife. Present for Versatile were Mr Allen and the Versatile Managing Director Mr Bruce Matheson (“Mr Matheson”). Mr Brinkman took notes of the discussion in his diary as the meeting proceeded. There were a host of issues put to Mr Brinkman. Mr Brinkman was given copies of documents in relation to Versatile’s concerns. At the end of the meeting Versatile undertook to provide further details to Mr Brinkman relating to a dinner at a Thai restaurant. Mr Brinkman was asked to provide his written response to the matters raised in the meeting by Wednesday 26 April 2006. Mr Allen told Mr Brinkman he was suspended immediately until issues were resolved. The suspension was on full pay and Mr Brinkman was permitted to use his company vehicle. He was however required to surrender his mobile phone, laptop, and office keys. Mr Brinkman was escorted out of the office to his car by Mr Allen.

[8] Mr Allen emailed Mr Brinkman after the meeting as follows:-

1. *Further to our meeting today, you have sought from us a letter confirming our discussions.*
2. *As you know, we raised a number of issues with you today. Although you were happy to respond to some of those, we wanted you to take some time to think through the issues before responding.*
3. *You requested I provide details of the information required regarding the dinner at Hidden Thai restaurant, these are outlined below;*
 - a. *Please tell me about this.*
 - b. *When was this planned?*
 - c. *Who made up the invitation list?*
 - d. *Why were other staff members not invited?*
 - e. *Why did Peter make the expense claim?*
 - f. *Were you aware that the amount of the claim exceeded your level of authority?*
 - g. *Was this a business function or a personal function?*
 - h. *Why was Ed van der Plas not invited or informed?*
4. *We discussed suspension with you, and your response was that you would be able to respond to the issues more quickly if you were not at work. We have therefore suspended you from your employment on full pay while this investigation is taking place. This should not be taken as a reflection of any outcome of the process. During suspension you will have the use of your company car however we have taken your keys, cell phone and laptop.*

Yours faithfully
VERSATILE BUILDINGS LIMITED

[9] Mr Brinkman responded by letter of the same date as follows:-

I am in receipt of your letter dated 20th April 2006 emailed to me by Maria Manihera. Please note that I disagree with Paragraph 4 in relation to the discussion on suspension.

Upon your advice of this morning I have spoken to my lawyer who has advised me to retain the services of a lawyer who specialises in employment law. I have spoken to two other lawyers who are unable to assist at this time. A third lawyer was out of the office today and will not be back until tomorrow Friday. My lawyer has advised me to request from you more time to prepare a written response in light of the holiday on Tuesday and there being only 2 working days aside from that in which to meet with a lawyer if they are available. I therefore request an extension to Friday 28th of April 2006 and will be able to advise tomorrow (21/04/06) if we can meet that extended timetable.

Can you please provide written receipt of the specific items and keys that I left in your possession this morning?

I would like to note that when I began in a salaried position with Versatile Buildings Ltd that the company took over the costs of my cellphone but that the phone and number were mine.

I would like to ask that private files and belongings on my laptop and in my office will be treated with confidence and respect. I would ask that everything that was on my laptop, both private and work related will be available if needed at any stage.

*Yours faithfully
Paul Brinkman*

[10] Mr Allen responded:-

Paul,

1. We are able to work with the extension requested for you to reply and seek suitable guidance and representation as you see appropriate and advised by the company during our meeting.

2. Included in the confirmation letter sent to you it confirmed that keys, mobile phone and laptop computer were retained by the company.

3. The company will do everything possible to respect your privacy in dealing with any personal possessions that it may come across during your suspension period.

4. Access to files or information stored on your computer can be requested directly to myself.

Regards John

[11] Mr Brinkman responded:-

John

Thank you for your reply. Unfortunately my computer played up yesterday and I could not get it to connect to the internet. I have obtained another one today. I aim to have a written reply to you by Friday 28th April 2006. In regards to the other issues raised I will reply as per notes that I have taken as you have not supplied a listing of all those issues that were raised at the meeting.

*Regards
Paul*

[12] Mr Brinkman wrote again to Mr Allen on 26 April 2006 as follows:-

John

After taking legal advice today I have been requested to ask you to put in writing the issues that have been raised and that you require a written response to. Once I have these I will meet with my lawyer and draft a response to those issues

Regards

Paul Brinkman

[13] Mr Allen responded on 27 April 2006 as follows:-

I am in receipt of your request and will advise later in the day

[14] Mr Allen wrote to Mr Brinkman by letter of 27 April 2006 as follows:-

Hi Paul

Please find below the points I require a response to, as discussed on Thursday 20th April:

1. *Expenses - Hidden Thai Restaurant*
 - a. *Please tell me about this.*
 - b. *When was this planned?*
 - c. *Who made up the invitation list?*
 - d. *Why were other staff members not invited?*
 - e. *Why did Peter make the expense claim?*
 - f. *Were you aware that the amount of the claim exceeded your level of authority?*
 - g. *Was this a business function or a personal function?*
 - h. *Why was Ed van der Plas not invited or informed?*

2. *Relationship with Ed van der Plas*
 - a. *I understand that you have felt the environment in Auckland to be "strained" – please explain this and why you feel this way?*
 - b. *Do you feel you have contributed towards this "strain" within the business?*
 - c. *Please explain each of the following comments which were enclosed in the emails I have provided to you:*
 - i. *"A lot of things Ed does is strange?"*
 - ii. *"I will be in at 3.30pm - don't tell Ed!!"*
 - iii. *"Birthday Shout - pick a day when he is in Hamilton"*

3. *Hiring of Staff*
 - a. *The appointment of Leon Sawtell for Henderson was made with no communication to any other senior management member.*
 - b. *On the 16th March 2006 Ed advised you during a discussion that all future appointments need to be discussed with him prior to recruiting.*
 - c. *I understand that during this conversation you then gave Ed a copy of your job description and asked him to find in there where it states you must discuss this with him.*
 - d. *Following this discussion you have since offered Callum Bellamy a role with the company, apparently without any discussion or approval being given.*
 - e. *Please outline your version of the series of events prior to recruiting Callum Bellamy.*
 - f. *As advised during our discussion I refer to you the levels of authority document, referred to in your contract on appointment of staff and making any commitment of any nature, which commits the company for, longer than three months.*

4. *Financial Issues*

- a. *Please advise why we have continued to make payments to contractors regarding computer and draughting claims when:*
- i. *They did not form part of their payment contract.*
 - ii. *It had been agreed on Thursday 26th May 2005 at a branch managers meeting what the payment terms should be.*
 - iii. *On the 30th June 2005 we discussed the branches general financial performance and I again reiterated the importance of ceasing payments outside the contractors agreed terms.*
 - iv. *Why commissions paid to contractors were above the agreed remuneration levels.*
- b. *Debtors*
- i. *It appears from email Correspondence that Ed van der Plas was being given incorrect information relating to individual debtors (Harris); within the Auckland branch and that you were colluding with Roz Johns as to how to answer the questions that Ed asked.*
 - ii. *Please explain this?*
 - iii. *Please explain why Harris does not appear as a debtor?*
- c. *Loyalty Payments*
Please explain Why you were unhappy sharing the information regarding loyalty payments to contractors with Ed van der Plas?

5. *Customer Relationships*

- a. *Please explain your involvement and handling of a complaint from a customer, Trevor West, who has highlighted his disappointment with you in his letter.*

Yours sincerely
Versatile Buildings Ltd
John Allen
GENERAL MANAGER

[15] That same day on 27 April 2006 Mr Brinkman's lawyer wrote to Versatile by facsimile requesting documentation and raising concerns about process. The lawyer suggested mediation but also requested a reply by 28 April 2006 and gave notice that Mr Brinkman intended to seek reinstatement from suspension in the Authority.

[16] Versatile's lawyers responded by facsimile letter of 28 April 2006 advising their view there was nothing to mediate, requiring Mr Brinkman's responses by 1 May 2006 and scheduling a meeting with Mr Brinkman for Thursday 4 May 2006.

[17] Mr Brinkman's lawyer provided a very lengthy written response to Versatile on the evening of Wednesday 3 May 2006. As a result, Versatile postponed the advised schedule meeting for the following day and its lawyers left a message on Mr Brinkman's lawyer's mobile phone at 1.23pm on Thursday 4 May 2006 to that effect.

[18] Mr Brinkman lodged an application in the Authority on 5 May 2006 seeking reinstatement from suspension. Following lodgement in the Authority of Mr Brinkman's affidavit, the Authority held a telephone conference with the lawyers on 9 May 2006. In this conference, Mr Brinkman's lawyer was informed a further meeting would be held with Mr Brinkman on 11 May 2006.

[19] On Wednesday 10 May 2006 Versatile's lawyers confirmed to Mr Brinkman's lawyer a meeting for 11 May 2006.

[20] The meeting of 11 May 2006 was a lengthy one. Mr Brinkman attended with his wife and his lawyer. The meeting was adjourned for further investigations. It was agreed that the company's response to Mr Brinkman's responses would be provided to him in writing the following day. This did not occur.

[21] In the meantime there were without prejudice discussions between the lawyers. Versatile's response was sent by email to Mr Brinkman's lawyer at 5.45pm on Friday 12 May 2006. The lawyers suggest it was opened the following day by Mr Brinkman's lawyer.

[22] The parties attended urgent mediation on 17 May 2006. Mr Brinkman was invited to put any final response he wished to make by 12.00pm on Thursday 18 May 2006. This was extended to 2.00pm and a response provided. Versatile then wrote to Mr Brinkman's lawyer the letter of 19 May 2006 terminating Mr Brinkman's employment.

[23] Mr Allen is adamant that Mr Brinkman was completely aware of the issues of concern to Versatile from the meeting held with him on 20 April 2006.

The merits

[24] The precise reasons for Mr Brinkman's dismissal are not particularly clear. The dismissal was preceded by much correspondence and it is difficult from that correspondence to ascertain decisively which of the matters traversed actually resulted in dismissal. The issues of concern had become significantly greater between Mr Allen's letter of 27 April 2006 and the lawyers' articulation of them in the letter of 12 May 2006. The Authority has some sympathy for Mr Brinkman in this regard. A dismissal is more difficult to accept where the precise reasons for it are not explicit. Despite there being much correspondence preceding the dismissal, the actual letter of dismissal fails to explain the reasons and findings made to justify the dismissal. This is in marked

contrast to the very comprehensive warning letter given to Mr Brinkman in December 2005. The dismissal letter of 19 May 2006 does not specify any particular reasons for dismissal but instead relies on a general allegation:-

The company no longer has trust and confidence in you given the seriousness of the situation. The company cannot allow you to continue to manage a Branch on the basis of your recent performance and attitude.

[25] Mr Allen tells the Authority that Versatile considered clearly that the matters raised with Mr Brinkman amounted to serious misconduct. He says it was clear Versatile could have no confidence matters would change. He concluded he no longer had trust and confidence in Mr Brinkman and could not allow Mr Brinkman to continue to manage a branch on the basis of his performance, attitude and serious misconduct.

[26] An allegation of loss of confidence and trust must always be objective sustainable. The critical question is whether the employee's conduct is compatible with the faithful discharge of their duty to the employer, not on their general level of competence or nous. I now give consideration to the question of whether the specific allegations singularly or cumulatively justify a decision to dismiss because of a loss of trust and confidence.

[27] From Mr Allen's evidence, there appears to the Authority four broad issues which ultimately led to Versatile's loss of trust and confidence in Mr Brinkman. These issues relate to emails, the Secret Thai Garden restaurant, the Hiring of staff, and financial issues.

[28] It is first necessary to put the dismissal of 19 May 2006 in context. Mr Brinkman was given a final written warning by Versatile dated 19 December 2005. That warning was written by Mr Allen himself and is as follows:-

Dear Paul

1. *I refer to your letter of 13 December 2005 and our meeting on 14 December 2005.*
2. *I have investigated further as a result of your written response that you were not receiving accurate reports of the true status of the jobs being completed (paragraph 5, paragraph 13).*
3. *I have again interviewed Roz, Kelvin and Peter. They confirm that it was common practice to invoice early or prior to completion. With the exception of October 2005, they believe you would have been aware of the Invoicing procedures.*
4. *The level and type of complaints being received from customers highlights that this is not a new practice, in fact you have confirmed this (paragraph 20) and that it is apparent you have*

chosen not to put in place any processes or procedures to remedy the situation, even when the problems this practice was causing became apparent within the branch.

5. *My chief concern is that I feel that you have breached my trust both in the way that this matter has been managed by you within the branch, in that you have not communicated a clear and truthful position of the accounts, and also in terms of the comments you have made throughout this investigation to the effect that staff in the branch are wholly responsible for the problem.*

6. *Please treat this letter as a final written warning that will remain in place for 12 months.*

7. *I require from you the following:*

(i) *An acknowledgement of responsibility of what goes on in the branch. You need to understand that as branch manager you are responsible for matters such as invoicing practices within the branch and responsibility needs to come from you and not be placed at the door of other staff members subordinate to you.*

(ii) *At all times financial reporting must give a completely accurate picture of what is occurring within the branch, and it is your responsibility to ensure this is the case.*

(iii) *To manage the procedures that I have now put in place to ensure that all contracts are completed and signed off as such by the building supervisor and/or contracts manager, and to conduct random inspections to ensure that they are in fact completed.*

(iv) *To manage debtors in a vigorous way to ensure that debtors are kept to an acceptable level.*

(v) *To respond to customers in a timely and professional manner and be constructive about resolving their concerns.*

8. *In my view all of these requirements are achievable, if, however, you feel you need training or assistance to achieve these objectives, then please discuss this with me. Any breach of these requirements will result in further disciplinary action, which may include dismissal.*

9. *Finally, I advise that your bonus will not be paid this year. This is not a punitive or disciplinary action. Rather, once the true performance of the branch became known, the bonus could not be justified. I appreciate sales targets had not been met when the decision was made to pay the bonus, however, the figures were sufficient to justify payment in any case. That is no longer the position.*

Yours faithfully

VERSATILE BUILDINGS LIMITED

John Allen

GENERAL MANAGER

[29] In his interim application, Mr Brinkman did not refer to this warning. He says essentially that he did not agree with the warning or the process in which it was given. He also says he has challenged it with Mr Ed van der Plas, Versatile's Northern Regional Manager ("Mr van der Plas") and Mr Allen.

[30] Mr van der Plas says he recalls only one occasion where Mr Brinkman said he was unhappy but he did not request any action from Mr van der Plas or indicate he was challenging it. Mr Allen says that when Mr Brinkman was given the warning at a meeting on 21 December 2005, he said he was unhappy, not in relation to the warning itself, but rather, he was not happy with his work and his hours of work. Mr Allen says that Mr Brinkman subsequently did not pursue any discontent in relation to the warning.

[31] Considering all these matters, on balance, I am not persuaded that Mr Brinkman has pursued a personal grievance in relation to the final written warning given to him. I find that he did not raise a grievance by putting his employer on notice that he had a problem and required his employer to address it. **I therefore decline to investigate the justifiability of that warning and I see no case for permitting it to be investigated out of time. I conclude then the final written warning must stand. There will be no orders by the Authority in relation to this warning.** Its issue to Mr Brinkman put him on notice that his employment was liable for termination. That is the context in which I examine the justifiability of his dismissal on 19 May 2006.

Hiring staff

[32] Mr Allen's advice of 27 April noted that in relation to the appointment of one Leon Sawtell, there had been no communication to any other senior management member. Mr Allen noted too that on 16 March 2006, Mr van der Plas had advised Mr Brinkman that all future appointments needed to be first discussed with himself (Mr van der Plas). Mr Allen noted that Mr Brinkman had invited Mr van der Plas to point to such a requirement in Mr Brinkman's employment agreement. Mr Allen went on to refer to a subsequent offer by Mr Brinkman of an offer of employment to one Callum Bellamy. Mr Allen expressly referred Mr Brinkman to the levels of authority document referred to in Mr Brinkman's employment agreement and making any commitment of any nature which committed Versatile for longer than three months.

[33] Versatile's lawyers' letter of 12 May 2006, revised the allegation to one of Mr Brinkman failing to consult at all over appointments, as distinct from an allegation of failing to discuss appointments particularly with Mr van der Plas having been specifically asked by Mr van der Plas to do so. This failure to consult is said by Versatile to be another example of Mr Brinkman choosing to ignore the correct procedure and amounts to serious misconduct.

[34] It is true that Mr Brinkman did not consult either Mr van der Plas or Mr Allen. His lawyer responded, by denying the allegation entirely. Mr Brinkman had previously raised matters of contract which had been noted by Mr Allen.

[35] The Authority concludes there is no express reference to any levels of authority document in Mr Brinkman's employment agreement of May 2005, although there is an agreement to comply with rules, policies and procedures.

[36] The employment agreement makes clear that Mr Brinkman was to report to the General Manager, Mr Allen. The Authority finds no evidence of an agreement that Mr Brinkman was to report to Mr van der Plas. Mr Brinkman maintains that he was never advised what Mr van der Plas' role or responsibilities were and how Mr van der Plas' role related to him. On balance the Authority is persuaded of it. So too, is the Authority persuaded that Mr Brinkman resented Mr van der Plas, his role and his scrutiny of Mr Brinkman's branch management. Mr Brinkman says that he had asked Mr van der Plas to respect his position as branch manager and the chain of command.

[37] But I find that the actual allegation and facts before Versatile relate to the appointment of Callum Bellamy. I find too that the "clear procedure" Versatile relies on is actually the discussion between Mr Brinkman and Mr van der Plas on 16 March 2006 in which Versatile says Mr van der Plas advised Mr Brinkman that all future appointments were to be discussed with Mr van der Plas. There can be no finding that Mr Brinkman failed to follow clear procedure if that procedure meant consultation with Mr van der Plas. Mr Brinkman was unclear as to how his role interfaced with Mr van der Plas. Given this uncertainty, it is wrong for Versatile to maintain that Mr Brinkman chose to ignore clear procedure.

[38] In these circumstances, I do not agree that Versailles's finding would justify dismissal.

Secret Thai Garden Restaurant

[39] This issue was initially raised with Mr Brinkman in the meeting held with him on April 2006. Mr Allen's letter of 27 April 2006 communicated the issue as follows:-

1. *Expenses - Hidden Thai Restaurant*
 - a. *Please tell me about this.*
 - b. *When was this planned?*
 - c. *Who made up the invitation list?*
 - d. *Why were other staff members not invited?*
 - e. *Why did Peter make the expense claim?*
 - f. *Were you aware that the amount of the claim exceeded your level of authority?*
 - g. *Was this a business function or a personal function?*
 - h. *Why was Ed van der Plas not invited or informed?*

[40] To celebrate Mr Peter Stanners', contracts manager, two years service with Versatile, staff attended a celebratory dinner at the Secret Thai Garden restaurant in Otahuhu on the evening of 15 March 2006. Mr van der Plas was not invited and nor did he attend. The dinner cost \$280.00 and the bar account \$138.00. That is a total of \$418.00. Mr Stanners himself sought reimbursement of

two separate sums of \$209.00 coded to different ledger accounts. Mr Brinkman authorised this claim for reimbursement.

[41] Mr Allen tells the Authority the issue here relates to Mr Brinkman's authority to incur expenses. He says Versatile's managers have authority to incur up to \$200.00 for expense claims according to a Levels of authority document of June 2005. He says it appeared that the claim was constructed this way so as to avoid the need for authorisation from Mr van der Plas'.

[42] Mr Brinkman said Mr van der Plas was not Auckland branch staff and therefore was not invited. He said Mr Stanners wished to claim loyalty points and so Mr Brinkman permitted Mr Stanners to pay for the dinner and bar account on his (Mr Stanners) credit card.

[43] Versatile subsequently revised the issue to relate to Mr Brinkman's expenditure more generally and issues about coding of expenses. His response through his lawyer was to request further information but essentially to deny the allegation and maintain Mr Brinkman had followed correct procedure.

[44] Ultimately however, before the Authority, Mr Allen says that Mr Brinkman was well aware of correct procedure in relation to expense claims, but he chose to ignore those procedures and acted outside his lines of authority. He says too that the Thai restaurant issue and previous dinners and events pointed out by Mr Brinkman, had been undertaken without the attendance or knowledge of the regional manager at the time, which Versatile does not regard as appropriate.

[45] Versatile concludes there was a lack of transparency which led it to a provisional conclusion that Mr Brinkman's conduct was an example of serious misconduct, and in other words, "dishonesty".

[46] The initial allegation in relation to the Secret Thai Garden restaurant became very "murky". I deal only with what is clear in relation to it. I agree that Mr Brinkman has authorised an expense which is improperly constructed and that Versatile was entitled to take this view. On its own, as a matter of degree, I do not consider that this allegation would justify dismissal. But I accept that it is relevant in terms of the conclusions Versatile reached in relation to Mr Brinkman's conduct about his financial management and issues of trust and confidence.

Financial issues

[47] Mr Allen's letter of 27 April 2006 raised financial issues in relation to payments to contractors, debtors and loyalty payments.

[48] The criticism of Mr Brinkman in relation to loyalty payments is not pursued by Versatile as is an issue relating to customer relationships.

[49] In relation to contractors, I have had great difficulty understanding what precisely is alleged, and much less proven. I find that the allegation has never been fairly put to Mr Brinkman. No specific details were provided to Mr Brinkman and he requested the same. His lawyer denied the allegation but also stated Mr Brinkman could not respond to generalities without specifics. Even before the Authority, there are no specifics for an assessment of justification. I consider it wrong and unfair in those circumstances, that Mr Brinkman should be found to have committed serious misconduct and exceeded his levels of authority, as well as disobeying a lawful company direction in relation to this issue.

[50] The debtors issue was first raised in Mr Allen's advice of 27 April 2006. In that advice, Mr Allen stated that it appeared from email correspondence that Mr van der Plas was "*being given incorrect information relation to individual debtors (Harris) within the Auckland branch*" and that Mr Brinkman was "colluding" with Roz Johns as to how to answer questions Mr van der Plas has asked. Mr Brinkman was asked to explain "this" and why Harris did not appear as a debtor.

[51] But by the lawyers' letter of 12 May 2006 the issue was said not to be one in relation to collusion. Instead as Mr Allen says now to the Authority, the "major allegation" was the filtering of information concerning matters that had previously been the subject of a warning. Mr Allen tells the Authority the situation is completely intolerable because of problems the branch experienced the previous year which were still continuing.

[52] In response, Mr Brinkman's lawyer again objected seeking particulars but repeated Mr Brinkman's response that Harris was simply not a debtor. But the lawyer did address the "major allegation" on Mr Brinkman's behalf in his advice of 18 May 2006 as follows:-

What evidence is there that my client gave instructions to filter information to Ed. You have no evidence to support such an allegation. Your client is referring to emails which say "ta" or "thankyou" as part of a grand conspiracy when there is no evidence of one. To pull out two or three emails, from many hundreds and suggest collusion, is evidence of a predetermined

intention on the part of Mr Allen to find serious misconduct when it even isn't there. It is clear from his language, and his body language on 11 May 2006 that he does not intend to listen with an open mind to what Paul is saying, and what the evidence is pointing to.

[53] In the course of Versatile's investigations, certain other matters transpired. Versatile's lawyers' advice of 9 May 2006 raised four other issues which were also discussed in a meeting on 11 May 2006 and repeated in the lawyers' advice of 12 May 2006. I note Mr Brinkman's lawyer's advice of 18 May 2006 objecting to these matters being pursued. The lawyer's principal objection was again, and quite rightly so in my view, that there was insufficient or a complete absence of information or detail provided in relation to them.

[54] An agreement entered into between Mr Brinkman for Versatile and one Mr Shaun Andrews permitted use by Mr Andrews of a company van "for work travel only". Mr Allen says this matter is a further instance of Mr Brinkman exceeding his authority. There are no express findings stated in relation to this matter.

[55] A further issue related to Mr Brinkman entering into a two year contract for new mobile phones for the Auckland branch. Mr Brinkman maintained one Mr Stuart Wakeley ("Mr Wakely") had approved this contract. Mr Brinkman was advised Mr Wakely denied any involvement in the matter. Mr Allen says Mr Brinkman exceeded his permitted authority. Versatile's lawyers said this matter against the background of other matters raised *"becomes an issue of serious misconduct based on the exceeding by Mr Brinkman of his authority"*.

[56] The last further allegation related to a 2005 Christmas function. Versatile's lawyers by their advice of 9 May 2006 enquired of Mr Brinkman why a the function budgeted for \$3,000.00 had actually cost \$5,449.00 and was shared over various cost centres. Mr Brinkman first said there may have been a coding error. Versatile considered that suggestion doubtful. Mr Allen tells the Authority he never authorised the overspending as Mr Brinkman also maintained. He also says Mr Brinkman did not consult with anyone else about the situation. But I conclude there was no detail provided to Mr Brinkman of this matter.

[57] So the allegation *Financial issues* was eventually distilled to the "major allegation" Mr Allen tells the Authority of. It arises out of specific email correspondence between Mr Brinkman and Ms Johns, which was also the foundation of the *Relationships* allegation.

Emails

[58] Versatile had concerns about Mr Brinkman's email correspondence, particularly those between him and the administrator Ms Roz Johns ("Ms Johns") in relation to Mr van der Plas. Mr van der Plas had his office in the same building with Mr Brinkman.

[59] The emails of concern were provided to Mr Brinkman in the meeting held on 20 April 2006. Mr Allen's letter of 27 April 2006 asked Mr Brinkman to explain each of the following comments disclosed in the emails provided to him:-

*A lot of things Ed does is strange
I will be in at 3.30pm – don't tell Ed!!!
Birthday Shout – pick a day when he is in Hamilton*

[60] Mr Allen articulates Verstatile's concern about the email correspondence. He says there are two themes. Of most concern, a desire by Ms Johns to check with Mr Brinkman before providing financial information to Mr van der Plas. The emails suggest Ms Johns attempts to speak with Mr Brinkman before going into a meeting with Mr van der Plas. When she cannot speak with Mr Brinkman she states she will have to "bluff". Secondly, the correspondence between Ms Johns and Mr Brinkman in relation to Mr van der Plas' presence in the office demonstrates an inappropriate discussion by Mr Brinkman as Branch Manager.

[61] Mr Brinkman did not deny his email comments in relation to Mr van der Plas. Through his lawyer, he suggested there was a "possible personality issue" between Mr Brinkman and Mr van der Plas and that such issues were trivial and ought not to have been elevated as issues of serious misconduct. It was suggested that the relationship required mediation or facilitation. Mr Brinkman further elaborated his perception that Mr van der Plas was undermining him as Branch Manager and not respecting his position as Auckland Branch Manager. Mr Brinkman explained that by "strange" he meant unusual and that he did not understand Mr van der Plas' reasons or motivations for doing things. He explained he resented Mr Brinkman's questioning of him. He explained Mr van der Plas continued to question suspiciously Mr Brinkman's and other staff's movements. Mr Brinkman also explained Mr van der Plas often seemed uncomfortable, and his presence created tension.

[62] I note these particular email threads between Ms Johns and Mr Brinkman in relation to Mr van der Plas as most concerning and typical of those relied on by Versatile:-

Mr Brinkman to Ms Johns:-

I will be in about 3.30pm to finish accruals - don't tell Ed!!!

Ms Johns to Mr Brinkman

SORRY TO HAVE TO TELL YOU THIS - BUT ED'S HERE TIL 5PM AS HE IS AT FLETCHERS MOST THE DAY TOMORROW AND HE HAS A HEAP OF WORK TO DO FOR JOHN BEFORE MONDAY

Mr Brinkman to Ms Johns

That's a change for him to have work to do!!!!

Ms Johns to Mr Brinkman

Ya never know - he "may" leaver(sic) earlier - I'll keep you posted

22 March 2006

Ms Johns to Mr Brinkman

Ed wants to see me later this afternoon – which is coming very soon

He is quizzing me on Leslie Harris job – WHY ISN'T IT SHOWING UP ON DEBTORS I just got "busy" and never gave him an answer Remember how sometimes we put money against debtors when there is no where else to put it – (well instead of raising invoice blah blah blah) – well that's why she isn't there – thats what we did – what am I going to say????? I don't want us getting in the shit? ... oh – he just said he wants to see me at 2.45

[63] In my view, this correspondence demonstrates persuasively the concerns Versatile had in relation to the email correspondence and about relationships. I accept that the emails presented to Mr Brinkman show a theme of a very disrespectful and unprofessional attitude by Mr Brinkman towards Mr van der Plas. I also accept that this same disrespect was perpetrated by Ms Johns and other staff and which Mr Brinkman participated in. But Mr Brinkman was the Branch manager.

[64] Mr Brinkman's response was to suggest that mediation or a consultant was the appropriate way to deal with what he alleged was a "personality problem". Inherent in that suggestion is the concession that there was a problem. That corroborates Versatile's concern. But his call for resolution should not have come as a result of a disciplinary process. He ought to have raised the matter with Versatile as soon as it became an issue. In any case, Mr Brinkman was resentful of Mr van der Plas. He admits as much. But I find that Versatile was right to conclude Mr Brinkman acted deliberately to exclude Mr van der Plas.

[65] Mr Allen regarded the matter more seriously than a simple personality conflict. I agree that it was more serious. Mr Brinkman was a senior officer of Versatile. Mr van der Plas was the

Northern Regional Manager and he was Mr Brinkman's superior. I find that Versatile was right to conclude that the correspondence showed a background of vetting information provided to Mr van der Plas. Mr Brinkman ought not to have fostered or continued such a dialogue with Ms Johns which was so defiant and disrespectful of Mr van der Plas' authority. Versatile also concluded Mr Brinkman was reluctant to openly share information with Mr van der Plas in relation to Versatile's financial management. I find that Mr Brinkman acted deliberately to exclude Mr van der Plas and fostered an entirely unprofessional and inappropriate dialogue with subordinate staff in relation to Mr van der Plas which was derogatory and divisive. In doing so, Mr Brinkman acted to undermine Mr van der Plas' authority. In this regard it is relevant to note that Mr van der Plas was engaged to assist Mr Brinkman following the issues that were the subject of the warning issued to Mr Brinkman in December 2005.

[66] The issue was significant because Mr Brinkman was a steward of Versatile's assets and funds. His role as Branch Manager was a critical one in terms of Versatile's financial management. Mr van der Plas had been engaged to support Mr Brinkman following the matters raised in relation to the warning of December 2005.

[67] Significant too, is that warning of December 2005 where Mr Brinkman was reprimanded for his communication. He had been put on notice for his conduct. The warning of December 2005 was specifically put to Mr Brinkman in the meeting held with him on 11 May 2006. His lawyer responded to the issue in advice of 18 May 2006 by denying the validity of the warning and confirming that it was challenged.

[68] Mr Brinkman, while maintaining each email of concern was being interpreted out of context but equally that there was a personality conflict, did not acknowledge he had fallen short of his managerial responsibilities in conducting the correspondence in question.

[69] These are all matters which relate to Versatile's trust and confidence in Mr Brinkman. The relationship between Mr Brinkman and Mr van der Plas was dysfunctional. That situation had the potential to cripple the operation of the branch. It was properly a situation that Versatile was concerned about. The email correspondence amply demonstrates a proper concern about Mr Brinkman's faithful service. Mr Brinkman's loyalties were misplaced. The correspondence between Mr Brinkman and Ms Johns is not consistent with his faithful service. Mr Brinkman owed loyal service to Versatile. In choosing to conduct himself in the way he did in relation to Mr van

der Plas, Mr Brinkman acted disloyally. I find that Versatile was right to seriously question Mr Brinkman's faithful service in this regard and it was right to conclude it could not repose the necessary confidence and trust in him, and particularly, because it had already warned him previously in relation to such issues.

[70] Despite the "multiple" allegations levelled against Mr Brinkman, I regard this final matter as the most pertinent. The allegation was clearly put to Mr Brinkman in the lawyer's letter of 12 May 2006. Mr Brinkman's lawyer addressed it on Mr Brinkman's behalf in the lawyer's reply of 18 May 2006. It is also to be considered together with the issue surrounding Mr Brinkman's authorisation of expenditure in excess of \$200.00 at the Secret Thai Garden Restaurant. I find that Versatile's decision to dismiss having warned Mr Brinkman previously about his responsibility to give a completely accurate picture of what was occurring within the branch is justifiable.

[71] Mr Brinkman also claims that he was not given an opportunity to make submissions to his employer as to the penalty. He had every opportunity prior to his dismissal to do so.

[72] Having considered the matter on an objective basis, I conclude the dismissal and how Versatile acted were what a fair and reasonable employer would have done in all the circumstances. **Mr Brinkman does not have a personal grievance and the Authority is unable to assist him. There will be no formal orders.**

Suspension

[73] Mr Brinkman claims he has a personal grievance for unjustifiable disadvantage in relation to his suspension on 20 April 2006. He says that towards the end of the meeting with him that day, the issue of suspension was raised for the first time. He says Mr Allen advised him that he would be suspended on full pay and that Mr Allen did not allow discussion regarding suspension. Mr Brinkman says he had not taken advice or arranged representation including in respect of the issue of suspension because he did not know that suspension was going to be considered. Mr Brinkman says he was distressed and upset at his suspension, and the way in which it occurred.

[74] Mr Allen says he thought it appropriate to suspend Mr Brinkman pending a final decision given what had happened the previous year. He says he was remarkably concerned at what had been happening at the branch and he did not want Mr Brinkman to remain with access to information that he may have tried to alter. Mr Allen says Mr Brinkman accepted he should be

suspended on full pay, with full use of the company car, because he felt he would be better able to reply.

[75] I do not agree if Mr Allen says Mr Brinkman agreed and consented to be suspended. I find that Mr Brinkman was not asked his views on whether he should be suspended before he actually was. I accept that Mr Brinkman was distressed by his removal from the branch and although I find Versatile was justified in removing Mr Brinkman from the workplace pending an investigation, it ought as a matter of fairness, to have permitted Mr Brinkman to be heard before it relieved him of his duties, his cellphone and laptop. I find the suspension was unjustifiable as procedurally unfair. I also find that Mr Brinkman did not contribute to the situation that led to this unfair suspension such as would required a reduction in the nature and extent of remedies to be awarded to him in relation to it.

[76] I award Mr Brinkman \$2,000.00 compensation for the hurt and humiliation, anxiety and embarrassment I find he suffered as a result of this unjustifiable action by Versatile in suspending him unfairly. **I order Versatile Buildings Limited to pay to Paul Brinkman the sum of \$2,000.00 as compensation.**

The bonus

[77] Mr Brinkman claims a bonus in respect of the 2005 year. The entitlement for this bonus arises out of the second schedule to Mr Brinkman's employment agreement where a performance incentive is specified as follows:-

We will agree on a number of performance targets. Your performance against these will be assessed annually. You will be eligible for a performance payment of up to \$15,000 at our discretion depending on the outcome of the assessment.

[78] There is also a memorandum dated 22 November 2004 headed "Re - Bonus Proposal 2004/2005" in which performance indicators are specified.

[79] Mr Brinkman says he was advised including in an email, that he would be paid a \$9,500.00 bonus in December 2005. He says that when he queried why he did not receive this sum, he was subjected to the disciplinary process which resulted in the written warning given to him dated 19 December 2005. He tells the Authority he believes that the bonus is withheld unreasonably from him in breach of contract.

[80] Mr Allen said this in the written warning to Mr Brinkman of 19 December 2005:-

9. Finally, I advise that your bonus will not be paid this year. This is not a punitive or disciplinary action. Rather, once the true performance of the branch became known, the bonus could not be justified. I appreciate sales targets had not been met when the decision was made to pay the bonus, however, the figures were sufficient to justify payment in any case. That is no longer the position.

[81] Mr Allen tells the Authority that discrepancies were found and Versatile refused to pay a bonus to Mr Brinkman based on the fact that a performance bonus would be completely contrary to its assessment because Mr Brinkman had not performed to the standard that would require a bonus. Mr Allen says that given the mess that Mr Brinkman left Versatile in terms of damage to customers and undermining of budgets that were set, it is optimistic of Mr Brinkman to expect a bonus.

[82] The bonus is by contract a matter of discretion. Mr Brinkman cannot challenge the discretion but its manner of its exercise can be questioned if it is not in accordance with good faith. I find that Mr Brinkman was informed he would be paid \$9,500.00 but that decision was revoked once further information came to light. Versatile has determined Mr Brinkman's performance is not deserving of any bonus. I consider that given the written warning issued to Mr Brinkman and the matters that were the subject of it, it is an appropriate exercise of Versatile's discretion not to have paid Mr Brinkman a bonus as a result. **There will be no orders in relation to this claim.**

Costs

[83] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Toohey is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Pa'u is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority