

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 127  
5400596

BETWEEN                      MATHEW BUCHAN  
Applicant

AND                              ELITE SPRAYPAINTING  
LIMITED  
Respondent

Member of Authority:      Rachel Larmer

Representatives:            David Prisk, Advocate for Applicant  
No appearance by Respondent

Investigation Meeting:      12 April 2013 at Auckland

Determination:              12 April 2013

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**DETERMINATION OF THE AUTHORITY**

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- A      Elite Spraypainting Limited unjustifiably dismissed Mathew Buchan. It is ordered within 28 days of this determination to pay him:**
- (a) \$3,840 lost remuneration;**
  - (b) \$4,000 distress compensation;**
  - (c) \$1,200 legal costs;**
  - (d) \$71.56 filing fee;**

**Employment Relationship Problem**

[1]      Mr Mathew Buchan started work as a spray painter for Elite Spraypainting Limited in January 2012. When Mr Buchan arrived at work on the morning of 26 September 2012 Mr Paul Chamberlain (sole director and 99% shareholder of the company) told Mr Buchan that “*it wasn’t working out*” and that he “*had to go*” When

Mr Buchan asked about working out a notice period Mr Chamberlain told him he had to “*leave straight away*”.

[2] Mr Buchan says he had no previous warnings and was not aware he was at risk of dismissal. He claims his dismissal was unjustified, that he was unjustifiably disadvantaged in his employment, and that he is owed wages arrears. The latter two claims were withdrawn at the investigation meeting this morning.

### **No appearance by Respondent**

[3] Elite Spraypainting did not appear at the investigation meeting despite being served with the Notice of Hearing. It also failed to file a Statement in Reply (SiR) or to respond to two offers from the Authority of extra time to apply for leave to file a SiR out of time.

### **No mediation**

[4] The parties have not undertaken mediation. Mr Buchan says he arranged mediation in January 2013 but it had to be cancelled because Mr Chamberlain refused to participate in the mediation process.

[5] On 13 February 2013 the Authority directed the parties to mediation and informed the parties of the possible consequences of breaching that direction. The Authority was advised by Mediation Services that the directed mediation did not occur because Mr Chamberlain did not respond to attempts to schedule a mediation date.

### **Issues**

- [6] The issues to be determined include:
- a. Was Mr Buchan’s dismissal justified?
  - b. If not, what remedies should be awarded?

## **Was Mr Buchan's dismissal justified?**

[7] The Authority is required to determine justification in light of the s.103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess 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>1</sup>

[8] When assessing justification the Authority must have regard to the four procedural fairness tests in s103A(3) of the Act. It may also consider other appropriate factors under s103A(4) of the Act. The Authority must not determine that a dismissal is unjustified solely because of minor process defects which did not result in the employee being treated unfairly.<sup>2</sup>

[9] A fair and reasonable employer is expected to comply with its statutory good faith obligations. Under section 4(1A) of the Act an employer which is proposing to make a decision that may adversely impact on an employee's continued employment is required to provide the employee with relevant information and an opportunity to comment on it before a final decision is made.

[10] Mr Chamberlain in an email to Mr Buchan dated 01 October 2012 says:

*“[...] Because of your repeated failure to follow basic instructions and perform duties as instructed, your employment agreement was terminated without notice for misconduct. [...]”*

[11] Mr Buchan says he had no previous warnings and he had not been subjected to a performance management or monitoring process. He was not given advance warning that his ongoing employment could be in jeopardy or that a possible outcome of meeting Mr Chamberlain on 26 September could be summary dismissal.

[12] Mr Buchan did not have an opportunity to respond to his employer's concerns because Mr Chamberlain never identified any specific disciplinary/performance

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<sup>1</sup> S.103A(2) ERA.

<sup>2</sup> S.103A(5) ERA.

matters. Mr Buchan was not given any information to support his employer's concerns or its decision to dismiss him.

[13] I find Mr Buchan's dismissal was substantively and procedurally unjustified. It is clear that Elite Spraypainting's actions and how it acted was not what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Mr Buchan.<sup>3</sup> It did not have a good reason for summarily dismissing Mr Buchan and it did not follow a fair or proper process before it dismissed him.

[14] Summary dismissal is limited to situations in which serious misconduct has fundamentally undermined the trust and confidence inherent in an employment relationship. That is not the case here. A dismissal for poor performance has to be on notice and can only occur after a graduated warning process has been exhausted. Again, that did not occur here.

[15] I find Mr Buchan had not received any warnings for poor performance before being dismissed. Nor had he been through a performance management/monitoring process.

[16] Elite Spraypainting did not follow any process at all, much less a fair or proper process, before dismissing Mr Buchan. The total lack of process is not a minor defect and it resulted in substantial unfairness to Mr Buchan, so s.103A(5) of the Act does not prevent me from finding that his dismissal is unjustified.

[17] I find Elite Spraypainting breached its good faith obligations under s.4(1A) of the Act by failing to provide Mr Buchan with access to relevant information and an opportunity to comment on it before he was dismissed. It has also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[18] These failures undermine Elite Spraypainting's ability to justify its dismissal of Mr Buchan because a fair and reasonable employer is expected to comply with its statutory obligations.

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<sup>3</sup> S.103A ERA.

## **Remedies**

[19] Having determined Mr Buchan has a personal grievance under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly. The evidence fails to establish on the balance of probabilities that Mr Buchan engaged in any blameworthy conduct, so remedies are not to be reduced on the grounds of contribution.

[20] I find Mr Buchan properly mitigated his loss. It took him four weeks to find a new job and for the first four weeks of his new employment he was paid \$3.00 per hour less than he received from Elite Spraypainting. I am satisfied Mr Buchan lost \$3,840 as a result of his unjustified dismissal.

[21] Elite Spraypainting is ordered to pay Mr Buchan \$3,840 under s.128(2) of the Act.

[22] Mr Buchan also gave evidence of the hurt, humiliation and distress his unjustified dismissal caused him. He required medical attention and was prescribed medication. He suffered financial hardship and the family unit became dependent on his wife's income until he found work. Mr Buchan had a six month old baby at the time of his dismissal.

[23] Elite Spraypainting is ordered to pay Mr Buchan \$4,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered.

## **Costs**

[24] Mr Buchan has incurred actual legal costs of \$2,613 together with his filing fee of \$71.56. As the successful party he is entitled to a contribution towards these costs.

[25] Adopting the Authority's usual notional daily tariff based approach to costs, the starting point for assessing costs in this matter is \$700.<sup>4</sup> This notional tariff must then be adjusted to reflect the particular circumstances of this case.

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<sup>4</sup> Based on length of investigation meeting.

[26] I do not consider there are any factors which warrant a reduction to the notional tariff. I consider that Elite Spraypainting's failure to participate in the first scheduled mediation and its breach of the Authority's subsequent direction to mediation are factors which warrant an increase to the notional tariff.

[27] Elite Spraypainting is ordered to pay Mr Buchan \$1,200 towards his costs plus \$71.56 to reimburse his filing fee.

**Other**

[28] Elite Spraypainting is ordered to pay the full amounts awarded to Mr Buchan within 28 days of the date of this determination.

**Rachel Larmer**  
**Member of the Employment Relations Authority**

