

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 167
5516284

BETWEEN JOSHUA KING
 Applicant

A N D LINFOX LOGISTICS (NZ)
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Robert Thompson, Advocate for the Applicant
 Stephen Langton and Tess von Dadelszen, Counsel for
 the Respondent

Investigation Meeting: 21 July 2015 at Christchurch

 Submissions received:
 At the investigation meeting.

Date of Determination: 4 November 2015

DETERMINATION OF THE AUTHORITY

- A. Linfox Logistics (NZ) Limited failed to carry out its suspension and dismissal of Joshua King fairly. However, Mr King's conduct in misrepresenting his previous criminal history contributed to the situation giving rise to his grievances to such an extent that any remedies otherwise due to him are reduced by 100 per cent.**
- B. Costs are reserved and a timetable for submissions has been set.**

Employment relationship problem

[1] Joshua King was employed by an agency, Agoge Limited (Agoge), which assigned him to work as a temporary storeman in Linfox Logistics (NZ) Limited's (Linfox) Hornby warehouse. He started work there in January 2014. Mr King was employed directly by Linfox on 31 March 2014.

[2] Mr King says that he was unjustifiably disadvantaged by being suspended on 6 June 2014 and that he was unjustifiably dismissed on 9 June 2014. By way of remedy, he seeks lost wages, compensation and legal costs.

[3] Linfox denies that the suspension and the dismissal were unjustified. It says that Mr King knew that a satisfactory report from the Ministry of Justice on his criminal conviction history was a condition of his ongoing employment. The report was not satisfactory. In addition, Linfox says Mr King lied on his employment application form by not disclosing all of his convictions. In particular, dishonesty convictions were so material to the role in which he had been engaged that Linfox could no longer trust him to continue in his employment having access as he did to Linfox's customers' products.

[4] Linfox also says that if the Authority finds any personal grievance to be proved Mr King should not be entitled to any remedies because of his contribution to the situation leading to his personal grievances.

The issues

[5] The issues the Authority needs to determine are:

- (a) Was Mr King unjustifiably disadvantaged when he was sent home early on 6 June 2014?
- (b) Was Linfox justified in dismissing Mr King?
- (c) If Mr King's dismissal was found to be unjustified, should remedies be reduced to nil due to his significant contribution to his dismissal?

Factual background and parties' evidence

[6] There was some ongoing work available in the warehouse. Mr King's supervisor at the time, Gurveer Benepal, asked him if he was interested in a

permanent job. Mr King said that he was and they discussed the hourly rate. Mr King says Mr Benepal asked him if there was anything that might prevent him from being successful in being taken on by Linfox. Mr King says he told Mr Benepal of his convictions and Mr Benepal did not seem too concerned about them, although he told Mr King he wouldn't pass the clean slate test because of his jail time. Mr Benepal then asked him if he would pass a drug test. Mr King said he would and Mr Benepal shook his hand. Mr King says that was how and when he was offered and accepted the job.

[7] All Linfox witnesses including Mr Benepal, who no longer works for Linfox, say that Mr Benepal did not have the authority to employ anyone and that there were set procedures for a prospective employee to go through, which included filling in an application form. I accept that Mr King could not be expected to have known that when Mr Benepal asked him if he was interested in a job with Linfox.

[8] Mr Benepal denies that he was ever made aware of Mr King having criminal convictions. He gave Mr King the application form.

[9] Usually Agoge undertakes a criminal history check and in the normal course of things it should have supplied that to Linfox once it received it. Mr King says he knew he had given Agoge permission to search his criminal conviction history.

[10] Mr King also says about a month before he became a permanent employee he told Colin Ritchie, the Leading Hand in the warehouse, about a lot of his convictions, including that *I had done some jail time*, and that Mr Ritchie told him he had done worse things in his youth. Mr King says Mr Ritchie told him we all do dumb things when we are young and the fact it was so long ago and that he was honest about everything meant it *wasn't going to be a worry*.

[11] Mr Ritchie says he told Mr King that if he had convictions Linfox would probably not employ him and Mr King told him he did have a couple, when he was younger. Mr Ritchie says he did not ask what the convictions were for and Mr King did not tell him. He vehemently denies telling Mr King he had done worse things or that we all do dumb things when we are young. He says he did not tell Mr King his convictions wouldn't be a worry.

[12] Lion Breweries is Linfox's main customer in the Christchurch warehouse. Noni Sekai, the Linfox Lion Breweries administrator, says Mr King came into the

office a couple of days after getting the application form from Mr Benepal. He wanted to give Mr Benepal the form. She checked it first and noticed parts of it, including the section about criminal convictions, were incomplete.

[13] Ms Sekai says that she explained to Mr King he needed to complete the entire form and to provide a copy of his driver's licence or birth certificate before Mr Benepal could accept the form. She says he asked her why he needed to do that and she took him through the areas on the form he still needed to complete. She says that she is sure she told him that even if Agoge had done a criminal history check Linfox would do its own and that if he had any convictions he needed to disclose them as the criminal history check would reveal them anyway.

[14] She explained to him it was her understanding that his employment was conditional on a satisfactory criminal history being received within three months. She likened it to a 90 day trial period and told him if Linfox was happy with the results of the ACC history check, criminal history check and drug and alcohol test his employment would be confirmed as permanent. She says Mr King acknowledged that he understood and that a couple of days later he came in with the form completed.

[15] On 26 March 2014 Mr King signed the Linfox application for employment form. The front page of the form reads:

Attached is an application for employment form which you are requested to personally complete.

The application form is a source of information, which will be used by the Company to assist it in considering your suitability for the position applied for. If successful, such information shall form part of the Company's employment records. Failure to supply the information requested could prejudice the Company's assessment of your suitability for the position.

Any offer of employment is made subject to your completing the Company's pre-employment medical, ACC history check and security check to their satisfaction.

[16] Page 9 of the form is headed:

If you are offered employment, the offer is made subject to a security check to our satisfaction.

Underneath that is *Do you have any criminal convictions?* Mr King ticked *Yes*.

[17] The next question is:

If YES, please supply the charge, details of the charge and year convicted below:

In answer, Mr King wrote:

Drink driving & disqualified driving & assault when I was younger.

[18] Directly underneath that information about the Criminal Records (Clean Slate) Act 2004 was given. Mr King was informed that in order for it to apply to him:

...you will have to meet a number of conditions to do with your conviction history. However, youth court outcomes, infringements, and overseas convictions are not “convictions” under the clean slate scheme, so will not be included when weighing up whether you qualify for a “clean slate”.

What conditions do I have to meet?

You must meet all conditions in section 7 of the Act (a summary is set out below) before your convictions can be withheld. The Act should be consulted for full information.

You must have:

- ***No convictions with the last 7 years;*** (emphasis in the original)
- *Never been sentenced to a custodial sentence e.g. imprisonment, corrective training, borstal; ...*

[19] Mr King ticked *Yes* to the question *Do you agree to Linfox Logistics (NZ) Limited obtaining a copy of your criminal record from the Ministry of Justice?*

[20] Mr King initialled all the pages except for the last page which he signed, which reads:

... to the best of my knowledge the answers in this application are correct and I understand that if any false or deliberately misleading information is given, or any material fact suppressed, I will not be accepted, or if I am employed, my employment will be terminated.

I understand that any offer of employment if made, is conditional on my obtaining: a full medical clearance through the Company’s pre-employment medical including a pre-employment drug screening; a satisfactory security check from the Ministry of Justice and a satisfactory ACC history report ...

[21] Mr King also signed a request form that allowed Linfox to access his criminal convictions history for the purpose of *pre-employment vetting*. He provided a copy of his driver’s licence as confirmation of his identification.

[22] Both parties agree Mr King started his employment with Linfox in the wine and spirits division from 31 March 2014.

[23] Linfox says a written offer of permanent waged employment was made to Mr King by letter dated 8 April 2014. Mr King says he did not receive such a letter. Ms Sekai again remembers taking Mr King through the letter of offer which stated that Linfox was pleased to:

... confirm the offer to employ you as a Storeperson ...

This offer is conditional on a satisfactory police check being completed within three months of commencement date and a satisfactory medical and ACC history check being completed within two weeks of commencement date.

[24] On the second page of the letter Mr King was asked to acknowledge by signing that he accepted the offer of employment and had read and understood the letter. Although Ms Sekai remembers seeing a copy of that letter signed by Mr King no such document is able to be produced now.

[25] Whitney Tahau began work as the Christchurch warehouse manager on 3 June 2014. As part of her introduction to the job Mr Ritchie and Ms Sekai told her that they had concerns about some of Mr King's behaviour. Ms Tahau reports Mr Ritchie saying that Mr King had a bad temper and she should be careful dealing with him. Ms Sekai said that Mr King had a confrontational demeanour and regularly raised concerns.¹ As a result Ms Tahau checked Mr King's file and discovered that there was no criminal history report on the file. She requested Agoge's copy of the criminal history check.

[26] Agoge had been sent Mr King's criminal history report by the Ministry of Justice on 11 March 2014 but it had apparently not provided it to Linfox until Ms Tahau received it on 6 June 2014.

[27] The Ministry of Justice report contained a greater number and different types of criminal convictions from those Mr King had disclosed on his employment application form.

[28] Mr King has a number of convictions from April 2003 onwards. His last conviction was in September 2011. His convictions include driving offences,

¹ Mr King and Ms Sekai agree that Mr King repeatedly asked for an individual employment agreement. He was entitled to have one and entitled to repeatedly ask for one since none had been provided to him.

including drink driving, shoplifting, burglary, threatening behaviour, male assaults female, more than one conviction for giving false details as to his identity or as to a driver's identity, common assault, wilful trespass, receiving stolen property, unlawfully taking a motor vehicle and possessing utensils for drug use.

[29] Mr King was imprisoned for offences committed in 2003, 2006 and 2008. He has also been sentenced to home detention, and convicted of breaching his home detention conditions.

[30] When Ms Tahau saw the criminal convictions report she made the decision to send Mr King home for the rest of the day. She says she had already sent two temps home that day because it was not busy and when she sent Mr King home she also sent another permanent employee home. Mr King was told he would be paid for the rest of the day.

[31] Mr King asked if there was anything wrong and Ms Tahau told him she was missing some recruitment documents and she had some concerns but she wanted to discuss them on Monday, 9 June 2014. She asked Mr Ritchie to walk Mr King to his car, which he did.

[32] Mr King says he was unjustifiably disadvantaged by being suspended. Ms Tahau and Mr Ritchie deny that they told Mr King he was suspended or stood down.

[33] Ms Tahau sent Mr King's criminal convictions report through to Louis Buckingham, Linfox's NZ safety and compliance manager, and Tony McKenna, the human resources manager.

[34] A few minutes later, after comparing the criminal history check with Mr King's application form Mr Buckingham sent Ms Tahau an email stating:

He has failed to declare a number of these offences on his application form and as such has falsified his application declaration. I will not be giving this MOJ a sign off. He is to have his letter of offer withdrawn and his employment terminated please.

[35] Mr King attended work again on Monday, 9 June 2014 at 11 am and was asked to come to a meeting with Ms Tahau, Paul Underwood and Brent Berry. Ms King either asked if he should have a witness or it was suggested to him by Ms Tahau. He came back with a witness.

[36] Ms Tahau read the following letter dated 9 June 2014, signed by Mr McKenna, to Mr King:

As you are aware the letter of permanent employment ... was conditional on a satisfactory police check being completed within three months of commencement date and a satisfactory medical and ACC history check being completed within two weeks of commencement date.

We have received a Criminal Convictions Report from the Ministry of Justice that is not satisfactory to our requirements and as a consequence we will not be confirming your employment.

You are hereby issued with one week's notice of the termination of your employment. ... You will not be required to work the final week Monday 9 June – Friday 13 June 2013(inclusive).

Determination

The law

[37] The test of justification under s.103A of the Employment Relations Act 2000 (the Act) applies. The test is whether what the employer did, and how it did it, were actions that a fair and reasonable employer could have taken in all the circumstances at the time.

[38] In applying the test the Authority must consider a number of factors set out in s.103A of the Act that relate to the process followed by the employer and any other factors it considers appropriate.

[39] However, the Authority must not find a dismissal to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

Discussion and findings

[40] In relation to what he disclosed on the application form, Mr King says that he was aware that Agoge had already done a criminal convictions history check and thought Agoge would have passed that on to Linfox. Another explanation Mr King gave was that there was not enough space to write all his convictions down. Neither of those reasons explains why he did not simply write something to the effect of “see the criminal history check already obtained by Agoge as there is not enough room here to list all my convictions”. Instead he chose to disclose only three selected convictions, none of them being for dishonesty.

[41] I do not accept that Mr King was already an employee as a result of his discussion with Mr Benepal about whether he was interested in a permanent role. That is partly because Mr Benepal was the person who handed him the application form to complete. It must have been obvious to Mr King when he did complete the form that it was more than a mere formality, or just the paperwork; he was asked to declare that everything he had written was correct and if it was not his employment would be terminated. A full offer and acceptance had not been made at that time.

[42] I prefer Ms Sekai's evidence that she went through the application form with Mr King and explained to him that if he had any convictions they would *come up in the Ministry of Justice check anyway* and that she explained why she needed a copy of his licence and made sure she got that to include with the application to the Ministry for his criminal history before the application form was given back to Mr Benepal. She had a detailed memory of her two interactions with Mr King about his application form and was consistent in her evidence. Also the Administration Checklist² provides some objective verification of the fact that if Mr King had not properly filled in the application form he would have been asked to do so. It has a section requiring a confirmation of whether Mr King's driver's licence had been sighted as that was compulsory for drivers. I also accept that a copy of his licence was required to confirm his identity when the criminal history check request was made and that Ms Sekai ensured he provided it.

[43] I am satisfied that Mr King had the application form at least overnight but probably longer before he brought it in to work where Ms Sekai went through it with him. I am satisfied he understood the form and understood the importance and possible consequences of what he was signing. Mr King was aware from the last page of the application form that he would be putting his employment in jeopardy if he gave false or misleading information in completing the application form. However, he gave misleading information when he only listed three convictions, none of which were dishonesty convictions.

[44] The Administration Checklist notes that Mr King's ACC history and security check requests were not sent off until 23 May 2014. There is no explanation for why they were not requested earlier.

² Document 29

[45] Linfox submits that the receipt of a satisfactory criminal convictions record was a condition precedent to confirming Ms King's contract of employment with it and Mr King did not meet that condition so it was entitled to terminate his employment. In the alternative, Linfox submits that it was entitled to terminate Mr King's employment on the basis of his dishonesty on the application form and its consequent loss of trust and confidence in him.

[46] Mr Thompson submits that there was no condition precedent that needed to be fulfilled but that in any event a fair and reasonable employer would ensure it completed critical checks prior to employment, particularly when the information could have been so easily sourced.

[47] There can be no objection to Mr Thompson's view that a prudent employer would complete critical checks pre-employment. That is particularly so in this case when Linfox could have obtained Agoge's copy of Mr King's criminal history very speedily. No doubt it would have also completed its own check. However, Mr King had the benefit, from 31 March until 9 June, of being in permanent employment with all the benefits that brings over and above temporary work. If Agoge's copy of the report had been provided to Linfox as soon as Agoge got it I have no doubt Mr King would not have been given any more temporary work with Linfox let alone been considered for direct employment.

[48] It is not necessary to consider Linfox's argument that a satisfactory criminal history report was a condition precedent to Mr King's ongoing direct employment. In its most simple terms I need to ask if whether what Linfox did and how it did it were what a fair and reasonable employer could do in all the circumstances at the time.

[49] I also need to consider whether Linfox acted in the way a fair and reasonable employer could in all the circumstances when it sent Mr King home on 6 June.

[50] Mr King had not been supplied with an employment agreement containing the contractual right for Linfox to suspend him. Therefore, the suspension was not necessarily justifiable. I consider that even if the terms suspension or stand down were not used Mr King was suspended from his work on 6 June. He was not told why and was not given an opportunity to give his view of whether or not he should be suspended. I consider Mr King's suspension was not justified and he has a personal grievance of unjustified disadvantage.

[51] In addition, Linfox's actions in the way it decided to dismiss Mr King and conveyed its decision to him were not the actions of fair and reasonable employer. In particular, Mr King did not know in advance of the meeting on 9 June what the meeting was about or that he stood a chance of being dismissed. He was not asked for his explanation and the outcome had been pre-determined. The procedural flaws were not minor and caused Mr King more than minor unfairness. On procedural grounds Mr King's dismissal was unjustified.

[52] However, I also need to consider Linfox's substantive justification for dismissing Mr King. Linfox is on strong ground with its argument that his criminal history, including dishonesty offences, coupled with his dishonesty on the application form caused it to lose the essential trust and confidence it needed to have in him.

[53] Mr Buckingham's evidence was that it is his role to assess criminal record histories of new employees alongside their application forms. He says that dishonesty convictions are of concern to him because Linfox holds goods for its customers and it needs to do everything it can to avoid employee theft. When he received the criminal history report he was surprised to see that Mr King had been employed and decided to compare the report to what Mr King had declared on his application form. When he saw that Mr King had not been accurate in his disclosing of his convictions he considered Mr King to have been dishonest in completing the application form.

[54] Linfox's larger North Island operations employ security guards to check what is leaving the warehouses. However, since Christchurch is a smaller operation Linfox does not engage any security guards. Linfox says that it is therefore even more vigilant about the background of the people it employs in its Christchurch warehouse. Ms Buckingham says he also took into account that the kind of goods Mr King worked with were easily moved and therefore perhaps more easily stolen.

[55] Mr King says he felt aggrieved that he had no opportunity to explain to Linfox on either 6 or 9 June how he had turned his life around since his last conviction in 2011 and how he really needed the job to support his young family consisting of his pregnant partner and his pre-school aged daughter. Breaches of natural justice are almost inevitably bound to leave the person who has not had a chance to explain their actions before facing a negative consequence aggrieved.

[56] I note that in Mr King's statement of evidence he wrote that he made the decision:

...to turn my life around and had the very hard job of changing my life for the better that I have been so proud about. ... I understand that I have a past, but that past has already been answered for and this should not disqualify me from my future.

[57] Mr King's brother, Dave King, also gave evidence of how Mr King had changed his life for the better.

[58] I asked Mr King why he considered that he had changed his life eight years ago when his last conviction for dishonesty was less than 2.5 years before he began working for Linfox. I accept that although Mr King made such a decision eight years ago to change his life, actually changing his life was an ongoing process. I accept that his last convictions prior to the two in 2011 were in 2008, 7 years before the investigation meeting.

[59] However, I consider that even had Mr King made his explanations to Linfox it would still have terminated his employment. I accept Linfox's submissions that Mr King's dismissal was substantively justified for a combination of the following reasons:

- His extensive criminal history, especially his convictions for dishonesty the latest of which was in September 2011, when Mr King gave false details as to his own identity to the police.
- Convictions of dishonesty are material to the role Mr King held.
- His misrepresentation of his criminal history on his application form.
- Linfox's responsibility to its clients, in this case Lion Breweries, to take all care to protect the client's goods.

[60] I accept Linfox's submission that it is one thing for a prospective employee to have prior convictions but to be honest about them and allow an employer to make its own mind up about whether he deserves a chance to prove himself on the basis of full disclosure. However, it is quite another for an employee to fail to disclose his convictions, effectively misrepresenting the extent and nature of some of them, and warranting that he has fully disclosed them.

[61] The two personal grievances have been proved, principally on procedural grounds, and I now need to consider the issue of what, if any remedies, Mr King may be eligible for.

Remedies

[62] Mr King claims lost wages for the five months it took him to find other work. His actual lost wages over the first three months were \$9,360.00. He also claims compensation for humiliation, loss of dignity and injury to his feelings.

[63] In two recent Employment Court cases *Knapp v Locktite Aluminium Specialities Limited*³ and *Waterford Holdings Limited v Morunga*⁴ Judges Inglis and Corkill found that although the dismissals were procedurally unfair the employees were not entitled to any remedies.

[64] In *Morunga* Judge Corkill wrote:

Section 123(1)(b) and s 128(1) of the Act confirm that before an award for lost remuneration is made, the loss must be as a result of the grievance. Here, the procedural error did not result in lost remuneration. Any actual loss suffered arose from the decision to dismiss, which was substantively justified consequently, no award for lost remuneration is appropriate.

The Court must also consider s 124 of the Act, which requires a consideration of contributory conduct. The section provides that when deciding the nature and extent of remedies in respect of the personal grievance, the Court must consider the extent to which the actions of the employee contributed towards the circumstances that gave rise to the personal grievance, and if the actions so require, reduce the remedies that would otherwise have been awarded.

*Lost remuneration would not have been awarded, as the personal grievance did not cause loss. Accordingly, that topic requires no further consideration.*⁵

[65] Similarly, although the process by which the decision to dismiss Mr King was made was unfair any lost remuneration resulted from the dismissal. That was caused by Mr King's actions in concealing his full criminal conviction history from Linfox. Therefore, I do not award any lost remuneration to Mr King.

[66] Mr King also claims a greater than \$10,000 award for humiliation, loss of dignity and injury to his feelings for the suspension and the dismissal. His evidence is he was hurt by the way Linfox handled the termination of his employment, as well as his suspension on 6 June. He says the loss of his job affected his confidence; he was

³ [2015] NZEmpC 71

⁴ [2015] NZEmpC 132

⁵ *Morunga*, paragraphs [37-39]

embarrassed to tell his friends about why he was dismissed and became withdrawn. He had to borrow money which was humiliating for him and he was worried about how he could provide for his family.

[67] I accept Mr King's evidence about his distress and humiliation and am pleased to hear he secured full-time work after five months. However, I am of the view, as Judge Inglis found in *Knapp*, that Mr King was the author of his own misfortune and:

*directly contributed to the situation that gave rise to the grievance and a full reduction in the remedies that he might otherwise have been entitled to is required. ... It would be contrary to the principles of equity and good conscience and the overall justice of the case to provide for any remedy in the particular circumstances.*⁶

Costs

[68] Costs are reserved. The parties are invited to agree on the matter of costs.

[69] If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[70] In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500 per day and the investigation meeting took one day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff, such as offers to settle made on a *Calderbank* basis.

Christine Hickey
Member of the Employment Relations Authority

⁶ At paragraph [36].