

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 560  
3201399

BETWEEN	ANTHONY ROBERTS Applicants
AND	BARFOOT & THOMPSON LTD Respondent

Member of Authority:	Peter Fuiava
Representatives:	Paul Barrowclough, counsel for the Applicant Rachel Scott, counsel for the Respondent
Investigation Meeting:	29 June 2023 in Auckland
Submissions received:	29 June 2023 from the Respondent
Determination:	27 September 2023

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] Mr Roberts' claim against Barfoot & Thompson Ltd (Barfoots) is one of unjustified dismissal for which he seeks compensation, lost wages, and costs. In response, Barfoots says that its decision to dismiss Mr Roberts for serious misconduct for failing to declare he had criminal convictions was substantively and procedurally justified.

**How has the Authority investigated?**

[2] For the Authority's investigation written witness statements were lodged from Mr Roberts who called no other witnesses. For Barfoots, written witness statements from (now) former general manager Grant Sykes and human resources manager Trevor Isted were provided. All witnesses answered questions under oath or affirmation from

me and the parties' representatives who also gave oral closing submissions at the end of the investigation meeting.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **What are the issues?**

[4] The issues requiring investigation and determination are:

- (i) Was Mr Roberts' offer of employment conditional on having a satisfactory result following a criminal record check or was his offer of employment unconditional?
- (ii) What was the sequence or chronology of events in relation to Mr Roberts accepting his offer of employment and when did the issue of his criminal record become apparent?
- (iii) Could Barfoots dismiss Mr Roberts on the grounds and for the reasons relied upon?
- (iv) Did Barfoots act fairly?
- (v) Was Mr Roberts unjustifiably dismissed?
- (vi) If any remedies are awarded, should these be reduced (under s 124 of the Act) for blameworthy conduct by Mr Roberts that contributed to his own grievance?
- (vii) Should either party contribute to the costs of representation of the other party?

### **What happened?**

[5] In July 2022, Mr Roberts applied for the position of property manager in Barfoots' Meadowbank branch office. He attended three separate interviews the third with Mr Sykes who subsequently made him a written offer of employment which Mr Roberts signed on 7 August.

[6] The offer of employment included in Mr Roberts individual employment contained the following clauses:

...

3.4 Basis of Offer – The Employee’s employment with the Employer is conditional upon a satisfactory outcome from a criminal record check for which the Employee gives consent to the Employer to obtain.

...

**Declaration**

I **Tony Roberts**, declare that,

...

(ii) I have not deliberately failed to disclose any matter which may have materially influenced the Employer’s decision to employ me or not.

...

(v) Do you have a criminal record of conviction for a crime or offence that would in any way be relevant to the position you are accepting at the Employer (other than one concealed by the Criminal Records (Clean Slate) Act 2004?

~~Yes~~/No  
(please select one)

I acknowledge that:

1. A misleading or false answer to this question may result in disciplinary action and summary dismissal from employment with the Employer;
2. My employment with the Employer is conditional upon a satisfactory outcome from the criminal record check.

[7] Mr Roberts answered “no” to the question at (v) of the declaration because he believed the question to be subjective which he answered honestly after considering his convictions and the nature of his position as property manager.

[8] Mr Roberts’ employment commenced on 9 August 2022. On 16 August, Barfoots sent him a link to authorise a criminal record check which he authorised on 18 August. On 24 August, the certificate was issued and it recorded that Mr Roberts had multiple convictions that were not clean slated and which included convictions for dishonesty in 1998, 2002 and 2011 and drink driving in 2013 and on 16 December 2021. However, the last drink drive conviction was entered late due to COVID-19 restrictions in place at the time which affected the operations of the District Court.

[9] On 25 August 2022, Barfoots wrote to Mr Roberts about its concerns regarding the outcome of the criminal record check and proposed a meeting on Friday 26 August so that he could provide further comment. Present at that meeting was Mr Sykes, Mr Isted and Mr Roberts who explained that he did not declare that he had convictions because he did not consider them relevant to his role given that most were from 20 years ago.

[10] On 30 August, Mr Isted advised Mr Roberts in writing of Barfoots' preliminary decision which was to dismiss him for serious misconduct because he had not declared his criminal record and that he had a drink driving conviction within the last 12 months. Barfoots' letter stated that there was a significant breach of trust that amounted to serious misconduct. The letter invited Mr Roberts to a further meeting on 31 August to discuss the preliminary decision.

[11] Mr Roberts attended that subsequent meeting and provided an oral and written response which Mr Isted and Mr Sykes considered. However, by letter of 31 August 2022, Barfoots confirmed its decision to summarily dismiss Mr Roberts for serious misconduct.

### **Was Mr Roberts' dismissal justified?**

[12] The question of whether a dismissal or other action by an employer is justified is determined on an objective basis by applying the test at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.

[13] Question (v) of the declaration that Mr Roberts signed asked him whether he had a criminal record of conviction for a crime or an offence that *would in any way be relevant* to the position for which he was applying. Mr Roberts answered that question by striking out yes and by circling "no" indicating that he did not have any relevant convictions. In his written witness statement to the Authority (27 April 2023), Mr Roberts explains that he answered "no" because it was his belief that the question was subjective which he honestly answered because he did not consider his convictions were relevant to his role.

[14] Mr Roberts further submitted that by answering in the negative, he was not in fact stating that he had no convictions but rather that he did not consider his convictions to be relevant. As a property manager, Mr Roberts stated that he would not have any responsibility for the receipt or lodgement of bond money, which was a matter for the head of department. As property manager, Mr Roberts stated that his financial responsibilities would be purely administrative and that he was not required to authorise

disbursements. As such, there was no risk to Barfoots in employing him as a property manager.

[15] It was Mr Sykes' evidence that the role required a high degree of trust as the property manager was required to prepare records for the receipt and payment of money, expected to appear in the Tenancy Tribunal on behalf of clients, and would have use of a Barfoots-branded vehicle. While I accept that Mr Roberts would not have been required to physically handle money or perform electronic payment transactions, as property manager he would still have to process work orders, fill in paperwork, and invoice contractors on his own and the branch manager would have to trust that the work had been done correctly. I find that the role of a Barfoots property manager is one that carries with it significant autonomy and is a high-trust role as a result.

[16] Question (v) of the declaration which Mr Roberts signed asked him whether he had a conviction which "*in any way*" would be relevant to his role. The question sets a low threshold. It does not ask whether in Mr Robert's opinion he has a conviction that could be relevant to his role but rather whether he had one which in any way could be relevant. In setting the bar low, a prospective employee is put on notice to be completely open and candid with the employer about their conviction history (if any).

[17] Had Mr Roberts declared correctly that he had convictions, I do not consider that this would have been necessarily fatal to his job application. The responsibility would then fall onto Barfoots to assess the relevance of his convictions taking into account the nature of them and the job requirements of the particular role. However, because Mr Roberts had failed to declare that he had convictions, Barfoots was denied the opportunity to make that assessment.

[18] The difficulty with Mr Robert's thesis that question (v) of the declaration is a subjective question is that it is inconsistent with his signed acknowledgement to the declaration as set out below:

I acknowledge that:

- (1) a misleading or false answer to this question may result in disciplinary action and dismissal from employment;
- (2) the employment with the employer is conditional upon a satisfactory outcome from the criminal record check.

[19] If question (v) of the declaration called for a subjective answer (which it does not) no answer however implausible could be regarded as misleading or false. Such an outcome would leave the employer in the precarious position of having no objective standard such as a police certificate to measure an employee's response.

[20] Mr Barrowclough invited me to adopt a restrictive interpretation to question (v) of the declaration and to adopt the inference that was most favourable to Mr Roberts. The restrictive approach in statutory interpretation is appropriate in the criminal jurisdiction where a defendant's liberty may be at risk but it is not apposite here where on a plain reading of the declaration its meaning is clear and unambiguous. Ms Scott's submission of a mixed subjective/objective test has some persuasiveness but I find it overly technical when faced with the plain meaning of the words when the declaration is read as a whole.

[21] While Mr Roberts states that it is his honest belief that his conviction history is not relevant to his role of property manager, it is an honest opinion that is not reasonably held. It is a matter for the employer and not the employee to assess relevance of a conviction. This is expressed in numeral 2 of Mr Robert's signed acknowledgment which says: *[the] employment with the employer is conditional upon a satisfactory outcome from the criminal record check* which underscores that it is Barfoots who must be satisfied of the criminal record check and not Mr Roberts. If Mr Roberts had declared his convictions and disagreed with his employer's assessment of relevance, it was open to him to raise a personal grievance with his employer whose decision would then need to satisfy the statutory test of s 103A of the Act.

[22] I acknowledge that Mr Roberts did provide Barfoots with the authority to request his criminal record but this does not mean that the criminal record check and his declaration at question (v) are two separate things as he contends. Numeral 2 of Mr Roberts' signed acknowledgment repeats cl 3.4 of the individual employment agreement which says that *[the] employee's employment with the employer is conditional upon a satisfactory outcome from a criminal record check*. Whether by good fortune or by good drafting, the repetition of cl 3.4 of the employment agreement in numeral 2 of the signed acknowledgment shows that the criminal record check and the declaration are connected.

[23] It was submitted that it was unfair of Barfoots to employ Mr Roberts before it had obtained his criminal record. Mr Roberts signed his employment agreement on 7 August 2022, commenced working for Barfoots on 9 August, and authorised the criminal record check on 18 August. His criminal record and traffic certificate was issued shortly afterwards on 24 August which Mr Sykes stated was unusually quick as the process could take several weeks. In any case, Mr Roberts had worked for 15 days for Barfoots before his police certificate was received.

[24] To say that Barfoots had set Mr Roberts up to fail by allowing him to work before it obtained his police certificate is unfair. Mr Roberts' curriculum vitae records a depth of experience in managing property. It is reasonable to expect a person of his maturity and life experience to have read cl 3.4 of his employment agreement which made his employment conditional on the satisfactory outcome of a criminal record check. He could have waited for that to clear before signing his employment agreement or he could have declared his convictions. That he was allowed to work for Barfoots before his criminal record was to his advantage as it enabled him to be onboarded sooner rather than later. It seems disadvantageous for an appropriate candidate to have to wait for several days or weeks before a police certificate is returned. In that time, the individual could be working and earning an income for themselves and their family if any. At the same time, the employer has a vacancy filled.

[25] As to whether Barfoots could have simply withdrawn its offer, the chronology of events indicate that Mr Roberts was already an employee by the time his criminal record came to light. The opportunity to withdraw the offer had come and gone which meant that Barfoots had to follow the disciplinary process described above which I find was fair and reasonable in terms of s 103A of the Act.

## **Conclusion**

[26] A plain read of the declaration that Mr Roberts signed indicates that he was required to declare whether he had any convictions or not and that it was up to Barfoots to ascertain whether those convictions were relevant to his role. Barfoots' decision to summarily dismiss Mr Roberts because he had failed to declare that he had convictions was a grounds for summary dismissal as this was serious misconduct. That was an outcome that falls within the range of outcomes of what a fair and reasonable employer could have done in all the circumstances.

[27] The claim is unsuccessful.

### **Costs**

[28] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[29] If they are not able to do so and an Authority determination on costs is needed Barfoot & Thompson Ltd may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Roberts would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[30] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff. For more information as to how costs are awarded in the Authority the parties are referred to its revised and consolidated Practice Note, effective 25 August 2023.<sup>1</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>1</sup> <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>