

WESTERN MAILING LTD v SUBRITZKY

Employment Court, Wellington (WC22/03)
Shaw J

7-8 April (2 days);
10 June 2003

Unjustified dismissal — Poor performance — De novo challenge to Employment Relations Authority determination — No salary increase after performance review — Dismissed at meeting to discuss performance issues — Unlawful suspension — Dismissal procedurally unfair and substantively unjustified — Defendant suffered considerably from suspension and dismissal — Compensation of \$27,000 awarded — No contributory conduct — Claim for exemplary damages dismissed — General manager.

The defendant was employed by the plaintiff as general manager of its Wellington branch. The defendant reported to the plaintiff's CEO in Auckland ("A"). The defendant's terms of employment included a salary of \$70,000, a company car, and a cellphone. The defendant's employment agreement provided for a 6-monthly performance review.

As a result of the defendant's performance reviews and monthly management meetings, a number of concerns were raised about the defendant's performance. He did not receive a documented copy of the outcome of the review. He wrote several e-mails requesting the information and a pay rise review. After a further performance review, he again asked for a salary review, but did not receive a salary increase. The meeting was followed by e-mails between A and the defendant. In one e-mail A stated "I feel that it would be best for both you and Western Mailing (the plaintiff) if you were to move on to something else."

The defendant was asked to attend a meeting at which he was suspended on pay. The meeting did not continue due to the absence of the defendant's representative. Following that meeting, A met with the rest of the staff and gave them each a bottle of wine as a token of appreciation for a good month. He also advised them that he did not think the defendant would return.

The parties were agreed that the defendant's employment had been terminated, but disputed exactly when that occurred. At a following meeting ("the 16 April meeting") the parties discussed the issues of concern, and negotiated for some sort of settlement. The defendant did not accept the plaintiff's offer and he alleged that he was dismissed at that point. At the end of the meeting he collected items from his office and gave back the keys to the company car.

A then wrote a letter to the defendant asking him to attend a further meeting at 4 pm to discuss the defendant's performance, and that an outcome of that meeting might be dismissal. After the defendant failed to attend that meeting (as his representative advised, since he was believed to have been already dismissed), the defendant was sent a letter terminating his employment.

The Authority held that the defendant had been unjustifiably dismissed and suspended without procedural or substantive justification. It awarded him \$27,000 compensation and \$13,076.92 in lost remuneration benefits.

Held, (1) the suspension was unlawful. Although the defendant had been given very late notice that his employment might be in jeopardy, he had not been forewarned that a suspension was even being contemplated. He was given no realistic opportunity to present any argument against his suspension. The suspension was undoubtedly prejudicial to the defendant. His evidence showed that he was devastated by what had happened. His humiliation was compounded by the knowledge that the staff had not only been told about his absence directly after it occurred, but were praised and given gifts at the same time. The impact on him was not minimal. (paras 50-53)

(2) There was no doubt that the defendant was dismissed at the 16 April meeting. The dismissal was both substantively and procedurally unfair. The plaintiff had started on the right track by preparing a memo of performance issues to be formally discussed with the defendant. However, that discussion never took place. It was not sufficient for the plaintiff to rely on past discussions as sufficient warning to the defendant of his deficiencies. The level of concern was not properly communicated to the defendant. (paras 54-56)

(3) The failure to hold a proper investigation meeting before dismissal was clearly procedurally unfair. At no time did the defendant have the opportunity to go through the memorandum of performance issues and give a measured response to them. Therefore, the plaintiff was not in a position to form a reasonable and balanced view that it was justified in dismissing the defendant. (para 57)

(4) The Court was satisfied that the defendant did suffer considerably from the fact and circumstances of his suspension and dismissal. It was clear that he had suffered a considerable degree of social dislocation as a direct result of his dismissal. The Court saw no reason to interfere with the award of compensation awarded by the Authority of \$27,000. There was no contributory conduct. (paras 60-65)

(5) The defendant's claim for exemplary damages was dismissed. There was no basis for a claim for exemplary damages arising from a personal grievance, as s 123 Employment Relations Act 2000 defined the remedies available and these did not include exemplary damages. (para 64)

Challenge dismissed; reimbursement of lost wages (quantum to be determined), compensation for humiliation etc (\$27,000); reimbursement of lost benefit (company car); costs reserved.

Cases referred to
Wellington Road Transport NUOW v Fletcher Construction Co Ltd (1983) ERNZ Sel Cas 59, [1983] ACJ 653

Challenge

This was an unsuccessful de novo challenge to an Employment Relations Authority determination which held that the defendant had been unjustifiably dismissed.

C. Paterson counsel for plaintiff (Western Mailing Ltd)

B A Corbitt counsel for defendant (Bruce Subritzky)

SHAW J (reserved): [1] Mr Subritzky's employment was terminated on notice from Western Mailing Ltd ("WML") on 16 April 2002. On 2 October 2002 the Employment Relations Authority determined that he had been unjustifiably dismissed (determination number WA97/02). It awarded him \$27,000 compensation and \$13,076.92 gross in lost remuneration benefits. Awards of exemplary damages and penalties, although sought, were not made. The Authority had no doubt about the merits of Mr Subritzky's case. It held on the basis of findings of fact that Mr Subritzky had been both suspended and dismissed without procedural or substantive justification. It also rejected the submission that Mr Subritzky contributed to the circumstances which gave rise to his suspension and dismissal.

[2] Western Mailing has elected to have a de novo hearing of the matter. There are two issues from its point of view:

- Was Mr Subritzky actually dismissed?
- If he were, should the remedies awarded be reduced for contributory conduct?

[3] In response, Mr Subritzky's statement of defence alleges that:

- He was unlawfully suspended without adherence to the rules of natural justice and without reason.
- He was then unjustifiably dismissed.
- He is entitled to a greater sum of reimbursement for lost wages and benefits and more compensation than awarded by the Authority including exemplary damages.

The facts

[4] These can be divided into four areas. Mr Subritzky's employment and performance, the events which occurred immediately before the termination of his employment, the suspension, and the termination.

Employment and performance

[5] WM is an outsource mail house. Its operations include data processing for major clients such as Contact Energy and Vodafone for whom it produces bills which are then printed and mailed out. As well it mails out direct marketing material and prints cheques for large businesses and Government departments. WM's Wellington subsidiary is Western Mailing (Wellington) Ltd ("WMW"). This case concerns the Wellington operation.

[6] The managing director of WM is Gary Lewis who is based in Auckland. Mr Subritzky reported to WM's CEO in Auckland. From May 2001 this was Bruce Armstrong.

[7] Mr Subritzky has a BA and masters degree in planning practice. He was appointed operations manager for WMW's Lower Hutt premises in May 1998 and was promoted to general manager of the Wellington branch in February 2000. His terms of employment included a salary of \$70,000 plus a company car and cellphone both of which could be used for private use. The employment contract also provided for a 6-monthly review of his past performance and future objectives.

[8] In the course of his employment Mr Subritzky went from manager of the technical and service teams at Lower Hunt to the most senior member of the branch, responsible for the administrative functions of the branch. For a while he also took on the role of client service director and remained responsible for the management of the Wellington sales team.

[9] Mr Subritzky presented as a hard working and conscientious employee who enjoyed his work. He was also anxious about his performance. He not only welcomed but sought out the 6-monthly performance reviews in part no doubt because a good result had the potential to be rewarded by a salary increase.

[10] His performance review which was due in the first part of 2001 was delayed to May 2001 while Mr Armstrong established himself in his job. Mr Subritzky sent a number of messages to Mr Lewis requesting this review. He also completed his own self-review and on 22 May requested a pay rise.

[11] In the meantime, Mr Subritzky attended regular monthly management meetings in Auckland where key performance indicators ("KPIs") were discussed.

[12] Mr Armstrong said that as a result of these meetings and the performance review W&M had a number of general areas of concern about Mr Subritzky's performance including timelines, sales performance of the Wellington branch, production and financial performance, and an alleged failure to follow instructions.

[13] Mr Subritzky did not receive a documented copy of the outcome of the May 2001 review which had been conducted by Mr Armstrong and Mr Lewis. He made several e-mail requests for the information including on 12 June an e-mail to Mr Armstrong noting there had been a 3-month delay in conducting the review and then a 3-week delay in signing off the performance review and his goals for the next review. He expressed frustration and said:

If there are other things that you need to address first then I would have preferred an up front approach from you.

[14] On 21 June Mr Subritzky sent another e-mail repeating his concerns at the delays and repeating his request for a pay rise review. He suggested an external mediator to assist in the completion of the review process. That e-mail produced a response from Mr Armstrong which recorded that he found Mr Subritzky's tone threatening and then set out a series of performance issues that he had with Mr Subritzky. He offered a salary increase of \$6,000 which was backdated to and paid from the salary review but otherwise was dependent on achieving some stated goals. Mr Armstrong said that Mr Subritzky did not achieve these and therefore the ongoing increase in salary was not actioned.

Events leading to termination

[15] In March 2002 another performance review was conducted. Mr Subritzky had prepared his own assessment which covered the six performance measures set the previous July, areas for improvement, and proposed goals for the next 6 months.

[16] Mr Subritzky's perception of the review meeting was that Mr Armstrong did not raise any major concerns apart from the fact that Mr Subritzky had not replied to some of Mr Lewis's queries quickly enough. Mr Subritzky asked for a salary review. Mr Armstrong told him that he would have to discuss it with

Mr Lewis. Mr Subritzky recalls telling Mr Armstrong that the status of his career and how he was rewarded for his efforts were important to him as he needed to consider what was best for him. If he was unable to get an increase he would have to consider his options.

[17] Mr Armstrong's version was that Mr Subritzky wasn't vaguely interested in what he had to say and kept pushing his version of events. He thought Mr Subritzky was only interested in a salary increase. He told Mr Subritzky that in his opinion Mr Lewis would not agree to one and asked him what would happen if he did not get a raise. Mr Armstrong said that Mr Subritzky replied that he would leave.

[18] Mr Armstrong does not accept that Mr Subritzky was unaware of the serious issues of concern arising from the review. He had confidence in the effort put in by Mr Subritzky but his performance was not up to the goals set and therefore decided there would be no salary increase.

[19] It is not necessary to determine finally what was said at this meeting. The evidence, however, demonstrates that these two able and well-intentioned men were not communicating satisfactorily. The meeting was followed by more e-mails of which two are important. In response to a request from Mr Subritzky for feedback on his review, Mr Armstrong wrote on 28 March:

Based on our discussion I set out to find out how you stood with Gary and I would say that in my opinion, the relationship between you is not salvageable. At the very mention of your review, he pulled out a file full of details of errors and credits and unanswered questions. There is a lot of history and I think that it will always colour the relationship. Then today there is the Contact Credits and its just a red rag to a bull.

From my perspective this makes the situation very difficult as these things will not go away and limit my ability to drive things forward.

From your perspective I think it is a destructive situation and I also know that on a point by point basis of the objective set there is little justification for an increase and Gary will not approve one without that support.

I know that this is not what you wanted to hear but really think that you need to think seriously about your future over the holiday weekend. I do not believe that it has to be this hard.

[20] Mr Subritzky replied that he was deeply concerned both professionally and personally by this e-mail and Mr Armstrong responded on 2 April:

I clearly cannot give you a pay raise based on the factors I set at your last review. Gary has a long list of problems that will always be brought up in relation to your performance.

We have a Wellington branch that will miss sales budget (and be less than last year) and may just about break even but only after a stupendously good last month and a severe reduction in budget at the time of the R&SA error.

I know that it is not from a lack of effort on your part but things are not going well enough and as I said last week I think that it is time that you really took a good look at your options.

Personally, at this stage, I feel that it would be best for both you and Western Mailing if you were to move on to something else.

I know that this is not pleasant to say or to face but I think that it is best to be realistic. Working relationships do not always last. I understand the level of effort and commitment that you have put in but it must be clear to you that this will not be rewarded here.

I hope that you understand that I am being brutally honest about this, and hope that you do not object to me writing it as I want to get the whole message across.

Best regards
Bruce

[21] Mr Subritzky then tried to engage Mr Lewis directly about his concerns by phoning him on 9 April in Auckland. They talked about the issues that Mr Armstrong had flagged including the list of problems concerning his performance and their relationship. Mr Subritzky told Mr Lewis that he would like to meet with him to go through his concerns to sort out any outstanding issues when he was in Auckland for a management meeting on 16 April. He said that Mr Lewis agreed to meet with him. Mr Subritzky reiterated that he was keen to stay with the company.

[22] When Mr Armstrong and Mr Subritzky spoke again, Mr Armstrong expressed the disappointment that Mr Subritzky had not got back to him and was dealing directly with Mr Lewis. Mr Subritzky asked for clarification of the performance issues in the 9 April e-mail. He expressed his own disappointment that Mr Lewis was unwilling to sit down with him to resolve any issues. He followed up that conversation with an e-mail to Mr Lewis asking if he was prepared to meet with him. But in fact Mr Lewis sent Mr Subritzky's e-mail back to Mr Armstrong to deal with.

[23] Mr Armstrong believed that as Mr Subritzky was not getting a salary increase he would now be leaving WMMW. He said he thought that Mr Subritzky was the one initiating the end of the employment relationship. He decided if Mr Subritzky was no longer interested in working for WMMW then he would do the decent thing and assist him to leave gracefully and with as much dignity as possible.

[24] Mr Subritzky did not think that the e-mails from Mr Armstrong had left him any discussion points to come back on and therefore did not reply to them although he did ask for some clarification.

[25] On Friday 12 April Mr Subritzky received a response sent the day before by Mr Armstrong. He was coming to Wellington that day and wanted a meeting along with Mr Wade Lewis, the company's financial accountant. He wanted a serious discussion about Mr Subritzky's future which he said may result in the ending of his employment. He asked Mr Subritzky to consider their previous e-mails.

[26] On receiving this e-mail Mr Subritzky contacted his lawyer. Mr Cressey was engaged in Court proceedings and although he was in contact he was unable to be present at any meeting that day. Mr Subritzky e-mailed Mr Armstrong advising that, given the lack of notice, the important nature of the meeting, and his inability to arrange a support person at short notice, a meeting that day was not suitable. He also asked for advance notice of the specific issues he wished to discuss at the meeting so that he could properly prepare. In response, Mr Armstrong e-mailed back that the meeting would proceed but an hour later than arranged.

[27] After speaking to Mr Cressey again, Mr Subritzky went to the meeting with the intention of having it postponed until the following Tuesday (16 April) when Mr Cressey was available, and obtaining an agenda of issues.

Suspension

[28] Mr Armstrong arrived at Mr Subritzky's office in Lower Hunt at about 2.30 pm on 12 April. Mr Subritzky told him again that he was not prepared to meet without representation and asked for the meeting to be postponed. Mr Armstrong asked for 5 minutes to consider his request. He came back with Mr Wade Lewis and agreed to delay the meeting until 16 April. Mr Subritzky said that Mr Armstrong then advised him that he was suspending him on full pay, effective immediately. When he asked why he was being suspended, he said Mr Armstrong said "Because I feel uncomfortable about having you around." Mr Armstrong's version is that he discussed with Mr Subritzky his wish that he go home until the rescheduled meeting and gave his reasons for wanting him to take time out. These were that he wanted him to think about his future and realise that this situation could not go on. He wanted Mr Subritzky either to resign or to make a commitment to address the shortcomings with his performance. He denies saying that he felt uncomfortable with him being around.

[29] In his evidence Mr Armstrong elaborated on his reasons for Mr Subritzky needing to leave the office immediately. He accepted it was not a case of serious misconduct but said that as he had assessed Mr Subritzky as a risk he was concerned for the security of confidential client and company information and data. He therefore made what was in his view an appropriate and proper risk management decision to ask him to stay at home given the ability he had to cause significant loss to WMMW and its clients. He believed that as Mr Subritzky was in the process of leaving the company he didn't feel his decision would disadvantage him in any way. He said he didn't have any concerns about Mr Subritzky's integrity and that it was not a reflection on him personally but a standard security precaution. Mr Armstrong didn't think that Mr Subritzky objected because he packed up a few possessions from his office and remained calm and collected. He did not appear to Mr Armstrong to be concerned.

[30] Mr Armstrong is now very surprised that Mr Subritzky was in fact extremely upset by what had happened and was reduced to tears when he had to tell both his partner and his parents about what had happened.

[31] Shortly after this meeting Mr Armstrong met with the rest of the staff and gave them a bottle of wine each as a token of appreciation for the very good month they had just had. He explained that Mr Subritzky would be returning for a meeting to discuss his future with the company. He reminded staff that the company was in business to make money and in response to a direct question from a staff member he told them that he did not think Mr Subritzky would return.

Termination

[32] The parties agree that Mr Subritzky's employment was terminated. At issue is when this occurred. Mr Subritzky says it was at the 16 April meeting. WM says it happened after that. Those involved in the 16 April meeting were Mr Subritzky and his lawyer Mr Cressey, Mr Armstrong and Wade Lewis. Mr Lewis's role in the proceedings was to take notes. Mr Cressey and Mr Armstrong also took notes and shortly after the meeting Mr Cressey dictated

a statement of problem which he said amounted to a contemporaneous note of what had just occurred.

[33] There were serious disputes between Mr Armstrong and Mr Cressey about what was said at this meeting. Mr Armstrong believes that the one page of notes Mr Cressey produced as those made by him at the meeting were in fact written after the event in preparation for the Employment Relations Authority meeting. He believes that Mr Cressey frantically wrote through the whole meeting over many pages. Mr Cressey denies this. Having heard both explanations I am satisfied that Mr Armstrong was mistaken in his belief as to what Mr Cressey wrote at the meeting.

[34] Much was made of a dispute about at what stage Mr Armstrong said that the meeting was off the record and without prejudice. Mr Armstrong said that he said those words at the beginning of the meeting. Mr Cressey said he said them when Mr Armstrong began to lay out the company's termination offer to Mr Subritzky.

[35] I do not consider that either man was lying about this point. It is a classic case of differing perceptions. Mr Armstrong went to the meeting, having taken legal advice. He believed that he should conduct it as a without prejudice managed exit. However, before he opened up the offer he began by referring to the topic of performance issues. Mr Cressey interpreted his remarks about without prejudice as relating only to the termination offer which was made shortly after.

[36] Mr Armstrong's evidence is that the 16 April meeting was a settlement meeting to attempt to resolve a pre-existing dispute between WAMW and Mr Subritzky and that it was held without prejudice. He said that Mr Subritzky had told him he would leave if he did not receive a raise and WAMW was not going to give him one. He believed that it was therefore only a matter of time before Mr Subritzky followed through with his intention and left. Mr Armstrong wanted to assist him by offering to help him without prejudice. He also believes that Mr Cressey attempted to trap him into dismissing Mr Subritzky. He denied Mr Subritzky's accusation that he was bullying and threatening at the meeting and said in turn that Mr Cressey was bullying and threatening.

[37] Having reviewed the oral evidence and notes of the meeting I am satisfied that it took place as follows.

[38] Mr Armstrong started the meeting by saying he was assessing the performance at the branch and it was time for Mr Subritzky to move on. He then said that he had discussed performance issues with Mr Subritzky and that they had come to the meeting to review these. He had with him a piece of paper which had these issues listed but did not specifically refer to these. This document was produced in evidence. It was dated 12 April and addressed to Thomas Subritzky from Bruce Armstrong re performance issues. It listed six issues. The memo said:

In response to your request I detail below the performance issues that have previously been brought to your attention.

[39] He spoke of Mr Subritzky's relationship with Mr Gary Lewis who was fed up with Mr Subritzky's lack of responses to him. There was no further discussion of the individual performance issues.

[40] At some stage during these preliminary remarks Mr Armstrong said that he wanted an off the record, without prejudice discussion about a way to resolve this. He then put the company's monetary offer after which the parties moved into negotiation mode with breaks being taken for Mr Armstrong to consult his lawyer and for Mr Cressey and Mr Subritzky to have private discussion.

[41] Mr Cressey came back with a counter offer which was roughly double the company's offer. This was rejected and then Mr Cressey raised the consequences of them not settling the matter. These consequences included Mr Subritzky making an application for reinstatement and legal costs as well as the possibility of a large award of compensation being awarded against WAMW. Mr Armstrong interpreted these statements as being threatening and bullying. All agreed that throughout the meeting Mr Subritzky appeared calm and collected and said next to nothing.

[42] At one stage, Mr Armstrong gave Mr Subritzky a half-hour to consider the company's offer. Mr Cressey asked what would happen if it was not accepted. Mr Armstrong said they would discuss that if he turned it down.

[43] When Mr Cressey and Mr Subritzky returned, Mr Cressey said that if the amount offered by the company was final then the answer was no. Mr Armstrong then told Mr Subritzky he was dismissed. Although Mr Armstrong denied this I am satisfied that he did say it because he accepted what then followed. Mr Cressey asked if Mr Subritzky was being dismissed summarily or on notice. Mr Armstrong asked what the difference was. Mr Cressey then asked Mr Armstrong for the primary reasons for dismissal. Mr Armstrong gestured to the document about performance. Mr Armstrong said he told Mr Cressey that he would send a letter outlining the outcome of the meeting.

[44] At the end of the meeting Mr Subritzky gave Mr Armstrong the keys to the company car and said he wanted to collect some things from his office. Mr Lewis and Mr Armstrong accompanied him while he did this. There was no suggestion that Mr Subritzky offered to resign. All of these actions are consistent with Mr Subritzky having been dismissed in the course of the meeting.

[45] Immediately after the meeting ended, Mr Armstrong wrote a letter to Mr Subritzky:

Dear Thomas
PERFORMANCE INVESTIGATION

I have concluded my investigation into the matters concerning your performance. I wish to meet with you this afternoon at 4:00 pm to put to you my initial findings. I will require a response from you.

Once I have received your response I will then make a decision as to whether your employment can be continued. If your employment can be continued then I may have to offer you additional training and support. However, given your seniority this may not be practicable.

You are entitled to bring a support person or representative to the meeting. I have taken the liberty of sending a copy of this letter to your representative. I am obliged to inform you that at the conclusion of today's meeting your employment may be terminated.

Yours sincerely
WESTERN MAILING WELLINGTON LTD
Bruce Armstrong
CEO

[46] Mr Cressey immediately replied:

Dear Sir
RE: THOMAS SUBRITZKY

I refer to your letter to my client dated 16 April 2002.

Your letter has both my client and I baffled. At the conclusion of this morning's meeting you dismissed my client, yet your letter requests him to meet with you at 4 pm this afternoon to discuss his performance. Your letter warns my client that he may be dismissed.

We can only presume that you have suffered a sudden case of amnesia, or your letter was sent to us in error.

You told us this morning that your company would pay my client three months wages in lieu of notice, plus 3 months compensation for loss of use of his company car during the notice period. This was to be based on the benefit of the car having a value of \$15,000 per year, so equates to \$3,750.

Please ensure that this amount is paid to my client forthwith.

Lastly, my client hereby raises personal grievances against your company regarding:

1. His unlawful suspension from employment; and
2. His unjustified dismissal.

He will shortly be filing his personal grievances with the Employment Relations Authority and the Authority will serve a copy on you.

Yours faithfully

Alan Cressey

Barrister & Solicitor

And received the following reply:

Dear sir

Re Thomas Subritzky

I refer to your letter dated 16 April 2002

The matters raised in your letter relate to discussions that we clearly pointed out were held on a Without Prejudice basis.

As such I am not prepared to engage in a debate with you as to what was or was not said during our Without Prejudice discussion.

Your client has not formally been dismissed.

However, if your client refuses and/or fails to meet with me at 4 pm today then I will have no choice but to proceed to make a decision in his absence. That decision may be that his employment is terminated.

If your client wishes to remain in employment with Western Mailing (Wellington) Limited, then he would be well advised to attend the meeting.

Yours faithfully

Bruce Armstrong

CBO

[47] Mr Cressey responded that Mr Subritzky had no intention of meeting with Mr Armstrong that afternoon and that he had already been dismissed. Mr Armstrong sent a final letter that afternoon terminating Mr Subritzky's employment. The two reasons given were:

- a. The performance concerns that have been discussed over recent weeks.
- b. The lack of co-operation and the adversarial and aggressive behaviour displayed by you and your lawyer through the process.

He said:

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For the reasons given above Western Mailing (Wellington) does not have any trust and confidence that you will discharge your duties and responsibilities in a professional manner and to an acceptable standard.

Effects of dismissal

[48] Mr Subritzky described the time since his dismissal as very difficult. He said it affected his social life because he found it difficult explaining why he has no work. He said he's experienced emotionally low periods, struggling for motivation to get out of bed in the mornings, and suffering from mood swings and depression. He produced a doctor's certificate dated 25 March 2003 which confirmed that he had sought medical assistance and was prescribed a course of anti-depressants for 3 months. He said he was embarrassed and ashamed of what he was experiencing and did not tell the Employment Relations Authority about it. He said that he stopped taking the medication in November 2002 because of the counter effect it was having on him. He and his partner, Erica Steele, both described his changes in mood, and financial stresses. He has been living on his savings since he lost his employment. He says that he has had a lot of trouble finding employment and blames this on the smallness of Wellington and the mailing industry. He said he had difficulty in meeting former clients and has lost contact with work colleagues. He says that he hasn't made written applications to gain employment within the outsource mailing industry but has networked with three different organisations. He has applied for 19 jobs in the last 12 months and although he has a masters degree in planning practice his lack of experience means that he would have to start in that industry at a lower level than he is qualified for.

Decision

[49] There are four matters for determination.

1. Suspension

[50] The suspension was unlawful. Although Mr Subritzky had been given very late notice that his employment might be in jeopardy, he had not been forewarned that a suspension was even being contemplated. He was given no realistic opportunity to present any argument against his suspension.

[51] I do not accept Mr Patterson's submission that Mr Subritzky used delaying tactics to avoid attending the 12 April meeting. He only received notice of the meeting on that morning and he was entirely justified in seeking legal advice.

[52] I am also sceptical of the reasons advanced by Mr Armstrong to justify the suspension. The issues between employer and employee were about work performance, not serious or other misconduct. Mr Armstrong told the Court he did not doubt Mr Subritzky's efforts to improve but that he was not successful in this. There is no evidence whatsoever that there were any grounds to question Mr Subritzky's honesty or reliability.

[53] The suspension was undoubtedly prejudicial to Mr Subritzky. His evidence showed that he was devastated by what had happened. His humiliation was compounded by the knowledge that the staff had not only been told about his absence directly after it occurred, but were praised and given gifts at the same time. The impact on him was not minimal.

2. Dismissal

[54] There is no doubt at all on the evidence presented to the Court that Mr Armstrong dismissed Mr Subritzky on 16 April 2002 at the end of the meeting. Mr Armstrong's denial of this is not credible in the light of the surrounding circumstances including his intentions from the beginning to have Mr Subritzky leave the company, the failed attempt to settle an exit package; Mr Armstrong's response to Mr Cressey's questions about the reasons for dismissal; and the fact that Mr Subritzky surrendered the car keys and collected his personal items.

[55] I reject the plaintiff's contention that Mr Subritzky and Mr Cressey tried to engineer a dismissal as contrary to the evidence and to Mr Subritzky's desire to keep his job.

3. Justification for dismissal

[56] Like the Authority, I am in no doubt that the dismissal was both substantively and procedurally unfair. Mr Armstrong had started on the right track by preparing a memo of performance issues to be formally discussed with Mr Subritzky. However, that discussion never took place. It is not sufficient for the plaintiff to rely on past discussions as sufficient warning to Mr Subritzky of his deficiencies. I formed the strong impression that while Mr Armstrong and Mr Lewis may have spent time discussing Mr Subritzky's performance between themselves, they did not properly communicate the level of their concern to Mr Subritzky. That is evidenced from his lack of recognition of the precarious situation that he was in right up until April 12.

[57] The failure to hold a proper investigation meeting before dismissal is clearly procedurally unfair. At no time did Mr Subritzky have the opportunity to go through the memorandum of performance issues and give a measured response to them. Therefore the employer was not in a position to form a reasonable and balanced view that it was justified in dismissing Mr Subritzky. This was an example of a "white hot angry dismissal."¹ The reasons given by Mr Armstrong in subsequent correspondence were clearly fashioned after the event.

4. Remedies

[58] Both the plaintiff and defendant dispute the level of remedies awarded by the Authority.

[59] Mr Patterson argued for the plaintiff that Mr Subritzky's humiliation was far from extraordinary and that the range of compensation should have been between \$2,000 and \$4,000. The plaintiff is sceptical of Mr Subritzky's medical report although this was admitted by consent and without requiring the doctor for cross-examination.

[60] I am satisfied from the evidence that Mr Subritzky did suffer considerably from the fact and circumstances of his suspension and dismissal. His need for anti-depressants is testimony to that.

[61] The plaintiff also suggested that Mr Subritzky's evidence that he wasn't able to maintain personal relationships with his former company workers was not

¹ *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* (1983) ERNZ 561 Cas 59, [1983] ACJ 653 at p 78; p 675.

credible but Mr Subritzky satisfactorily answered that under cross-examination. Any contact he had was brief. It is clear that he has suffered a considerable degree of social dislocation as a direct result of the dismissal.

[62] The defendant is seeking \$50,000 but accepted that the Authority had made a principled decision in reaching the level of compensation for both suspension and dismissal of \$27,000.

[63] I see no reason to interfere with that award. I also agree that there are no grounds to justify the reduction of that award by reason of any contributory behaviour by Mr Subritzky. Mr Patterson made the remarkable submission that it should be reduced by 100 percent. He based this on Mr Subritzky's refusal to attend any meetings after 16 April. This submission is based on the incorrect presumption that Mr Subritzky was not dismissed on 16 April.

[64] The defendant's claim for exemplary damages is also dismissed. There is no basis for a claim for exemplary damages arising from a personal grievance as s 123 of the Employment Relations Act 2000 defines the remedies available and these do not include exemplary damages.

[65] Mr Subritzky is entitled to an award under s 123(c)(ii) to compensate him for loss of income. As at the date of hearing he had not obtained work in spite of applying for numerous positions without success. Mr Subritzky is entitled to his salary from the expiry of his notice period.

[66] Although Mr Corkill argued that this should be paid at the higher rate of \$76,000 per annum this is dependent on the finding that the \$6,000 increase given to him in June 2001 was in force from that time. I am not satisfied that it was. Mr Armstrong authorised the increase only on the basis that certain criteria were achieved. This did not happen to Mr Armstrong's satisfaction and Mr Subritzky did not have an ongoing entitlement to that salary increase.

[67] In its determination the Authority stated (Para 37):

I must state that I was surprised that this case was defended on the question of justification for dismissal rather than the parties having a shorter investigation meeting over the issue of quantum of compensation only.

[68] I concur with this statement. The plaintiff has taken a blinkered approach to this case. If it did not realise before the Authority's determination that it had acted without justification it should have following that.

Conclusion

[69] Mr Subritzky was unjustifiably suspended and then dismissed. He is awarded \$27,000 compensation, payment of lost remuneration at \$70,000 per annum from 31 August 2002 to 7 April 2003, as well as the loss of benefit of the company car for the same period.

Costs

[70] Counsel asked for these to be reserved. If they cannot be resolved between the parties a memorandum from the defendant should be filed within 21 days of receipt of this decision. A memorandum in reply from the plaintiff will be filed within 14 days of that.