IN THE EMPLOYMENT COURT
AUCKLAND

AC 24/08
ARC 68/07

IN THE MATTER OF	a non de novo challenge to determination
BETWEEN	BLAGOJA PANOVSKI Plaintiff
AND	MARINE TRIMMERS AND ALL AWNINGS 2004 LIMITED Defendant

Hearing: 2 July 2008
(Heard at Auckland)

Appearances: Glenn Finnigan, counsel for plaintiff
Michael Robinson, counsel for defendant

Judgment: 25 July 2008

JUDGMENT OF JUDGE B S TRAVIS

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[1] This case is about remedies. Mr Panovski has challenged the adequacy of the remedies awarded to him by the Employment Relations Authority in a determination dated 26 July 2007. The defendant says that the remedies awarded were adequate and indeed should be reduced further because of the high level of contributory conduct on Mr Panovski's part. The defendant has not challenged the Authority's conclusion that it unjustifiably dismissed him.

Factual background

[2] Mr Panovski received an offer of employment as a Marine Trimmer/Canvas Fabricator with the defendant on 10 August 2006 from Evan Steers, the defendant's managing director, and commenced work on 15 August.

[3] Mr Steers provided Mr Panovski with an individual employment agreement which stated that the employment was subject to a trial period of 3 months. It was not initially signed by Mr Panovski. After the three month period had expired the agreement was eventually signed by the plaintiff and Mr Steers on about 29 November 2006. The agreement provided for reviews during the first three months but no such reviews had taken place.

[4] Mr Panovski claims that he chased Mr Steers for those reviews. He received complements from Mr Steers on how nice his work had looked on a number of occasions during this period.

[5] The review to confirm Mr Panovski's employment took place on 6 December 2006. Mr Steers expressed satisfaction with Mr Panovski's work. Mr Panovski then asked for an increase in pay. Mr Steers told him the defendant was not in a position to increase his pay as the defendant was owed money by customers and mistakes in a number of jobs had also cost the defendant money.

[6] During the discussion Mr Steers produced a letter dated 17 November 2006, from a customer I shall refer to as Mr A, complaining about the workmanship on one of Mr Panovski's jobs. They discussed the issues raised by Mr A. It appears to be common ground that, although Mr Panovski's workmanship on Mr A's job was discussed, Mr Steers did not expressly state that any improvement was required, nor was any warning or a caution given about Mr Panovski's workmanship.

[7] A number of other jobs were also discussed at the meeting. They were not jobs performed solely by Mr Panovski. Mr Steers says that he raised these as examples of the problems the defendant was experiencing and why it could not increase Mr Panovski's pay. Mr Steers claims that they also discussed the time Mr Panovski was taking in performing various jobs and he asked Mr Panovski to make sure that Mr Panovski improved his performance in this regard as it would contribute to the defendant's profitability and the prospect of Mr Panovski receiving a pay rise in the future.

[8] Mr Steers advised Mr Panovski that his employment was confirmed at the conclusion of the meeting. Mr Steers claims that he told Mr Panovski that his pay would be reviewed in a further 3 months. Mr Panovski claims that Mr Steers simply said there would not be an increase in salary and there was no discussion or agreement about when his salary would be looked at next. Mr Steers accepted in evidence that he did not use the review process to criticise Mr Panovski's work as he was generally happy with Mr Panovski's performance, and Mr Panovski would have come away from the meeting with that impression.

[9] Where there is a conflict in the evidence between Mr Panovski and Mr Steers as to what was said at this meeting, I prefer the evidence of Mr Steers supported as it was by notes taken at the time. The differences in the evidence are largely matters of emphasis and recollection.

[10] On Thursday 21 December 2006, Mr Panovski received his payslips for the Christmas holiday period. He claimed that because of the way he had been paid by his previous employer he felt that his holiday pay should have been calculated on the basis of 6 percent of the wages he had received since starting his employment. The following is his account from his written brief of evidence, read to the Court, on how he dealt with this. He stated:

> *So I raised this with Mr Steers on 21 December, and I was aware that my colleague, Michael, was also concerned about the holiday pay he was receiving and he spoke to Mr Steers about it as well. Eventually Mr Steers agreed to pay us an extra week's pay. I was quite happy with this outcome, but the incident had left me slightly distrustful of Mr Steers.*

[11] This account may be contrasted with Mr Panovski's supplementary oral testimony led by Mr Finnigan probably in response to Mr Steers's brief of evidence served before the hearing. Mr Panovski denied Mr Steers's allegations that when he received his pay slips he became angry and claimed that Mr Steers had "*ripped him off*". Mr Panovski said he went to the office of Angela Steers, Mr Steers's daughter, and the office manager of the defendant, and asked about it because he thought there may have been a mistake. She told him that this was the way she had been told to do

the holiday pay. Mr Panovski returned to the factory and waited until Mr Steers came into the factory at about 1.30pm, asked to talk to him about the holiday pay and, followed by another trimmer called Michael, they went into Mr Steers's office. Mr Panovski claimed he never told Mr Steers that he thought Mr Steers had "*ripped him off*" and that he was nice and polite and wanted an explanation from Mr Steers.

[12] Mr Panovski claimed that Michael had followed him into the office and used the words to the effect, "*you have ripped me off*", to Mr Steers. Mr Panovski claimed that he was aware that Michael had called the Labour Department previously and someone from the Labour Department had told Michael that someone had tried to "*rip him off*" so that is what Michael had said to Mr Steers. He described Michael as very red in the face with tears in his eyes and very angry. Michael walked up to Mr Steers and said "*give me my money*" and then he punched Mr Steers. Mr Steers went down on the floor and was shocked and tried to stand up but Michael pushed him down again. Mr Panovski claimed that he did not know what to do because he was also shocked and afraid. He said Mr Steers stood up from the floor and told Michael, "*okay I'll pay you one more week and it doesn't have to be this way*".

[13] Mr Panovski denied that he was angry at all and said he was happy and satisfied that one more week was going to be paid to all the staff. He claimed that they then shook hands as gentlemen.

[14] Mr Panovski remembered Mr Steers coming into the factory later that day telling him that he had been talking to the Labour Department and had been told that he had been correct in his initial treatment of the holiday pay. Mr Panovski said that he did not say anything and just continued to work because the matter had already been dealt with.

[15] The account Mr Steers gave to the Court of the incident was materially different. Mr Steers says he was confronted by Mr Panovski and Michael in his office and both were very aggressive and threatened him. They would not listen to reason. Mr Panovski was the instigator of the conversation and he started by saying that Mr Steers had "*ripped him off*" and that Mr Steers was a bad employer. Mr

Steers explained how the holiday pay had been calculated during the period when the factory was to be closed for 14 days. They responded this was not correct. Michael stepped forward, said that Mr Steers had "*ripped him off*", he wanted his money, and then pushed Mr Steers to the floor. Mr Steers got up and said "*Mike there is no need to carry on like this*". Mike pushed him down again. He got up and tried to explain again. Both were yelling at him. As a result, after he got off the floor for the second time, and out of fear for his personal safety, Mr Steers said he proposed crediting them all a further week's pay.

[16] At that stage Ms Steers looked into the office and said "*What's going on in here, get out*" and both Mr Panovski and Michael turned around and walked out. Mr Steers said that he then rang the Department of Labour and had been told that he had correctly treated the holiday pay. He went around each of the members of the staff and told them this individually. All the staff had accepted this. He went to Mr Panovski last and Mr Panovski said "*no, you are dishonest, you are a bad employer*" and would not accept the position. Mr Steers claimed that Mr Panovski would not even listen to him and was obviously very angry. He then discussed the matter with Ms Steers and that evening they credited a further week's salary into each person's account as an act of good faith.

[17] Ms Steers gave evidence which was similar to her father's. The differences in their evidence were minor and immaterial. She said on 21 December, after she had given the payslips to each staff member and before she had a chance to return to her desk, Mr Panovski came up to her waving his payslip and saying "*this is not right. You ripped me off*". She claims she was confused and shocked by this attitude and said that she would talk to her father when he got back. She was uneasy about Mr Panovski's behaviour because he seemed very angry. She saw Mr Panovski discussing the payslips with two other employees. When her father came back to the office, Mr Panovski and Mike approached him straight away. Her desk was just outside the office and she could hear what went on, though she did concede in cross-examination that she did not hear every piece of the conversation because she had become distressed at what she did hear. She heard Mr Panovski, but not Michael saying that Mr Steers was ripping them off and Mr Panovski appeared to be very upset and angry. When she heard a chair moving and what sounded like her father

being pushed she became nervous and so concerned that she put her head into the office to see what was happening. She could see that her father had been pushed and was getting back onto his feet. She was shocked and said "*what are you doing*" and told them to get out. Mr Panovski again said that he was being ripped off and then left Mr Steers's office.

[18] Ms Steers said she was so upset by this stage that she was in tears. She did not hear her father offering another week's pay but heard him say something to the effect that it does not have to be that way. She said that after Mr Steers rang the Department of Labour he said they would pay a week's pay to appease everyone even though there was no legal need to do so.

[19] I am satisfied from the evidence of Mr Steers and Ms Steers that Mr Panovski did accuse Mr Steers of ripping him off and that Mr Panovski appeared to be very angry and raised his voice during this incident. I found the evidence of Mr Steers and his daughter to be quite compelling and prefer it to that of Mr Panovski. I find they were both very distressed by the incident but were doing their best to tell the truth about Mr Panovski's behaviour.

[20] The following morning, 22 December 2006, Mr Panovski did not come into work at his usual start time of 8am. Mr Steers had waited for him in order to give him his instructions on a job but Mr Steers had to leave for another job at about 8.40am, by which stage Mr Panovski had still not arrived. Mr Steers said he was developing concerns that Mr Panovski was not going to return to work at all.

[21] Mr Panovski gave evidence that he wanted to check his pay had gone through to his bank before the final working day for 2006 and was late because he was checking this on his computer. Mr Panovski claimed that he arrived around 8.40am after having found the payments had been properly credited.

[22] Ms Steers gave evidence that Mr Panovski arrived a little after 9am. I find it is more likely than not that Mr Panovski arrived close to 9am. It does not appear that he offered any explanation at the time for his lateness.

[23] Ms Steers gave evidence that everyone at the workplace was glum and distressed that morning because of what had happened the day before over the payslips. Mr Panovski eventually headed out to deliver some swabs for a job for a customer I shall refer to as Ms K. Mr Panovski was accompanied by another employee, Kazuhiro Watanabe. They returned some time between 1.30pm and 2.30pm. At that stage Mr Steers was loading a van for another job, saw Mr Panovski arrive and claimed in evidence that Mr Panovski got out of the ute, turned around, and headed down the drive and went off home without saying a word. Ms Steers gave evidence which supported this.

[24] Mr Panovski gave evidence that he called out "*see you next year*" or words to that effect and wished them a Merry Christmas. Both Mr Steers and his daughter deny that such words were used.

[25] In his brief of evidence Mr Panovski said that he had mentioned to Mr Watanabe that he would be returning on 15 January 2007 but accepted that he had not discussed that with Mr Steers. He claimed that his relationship with Mr Steers had been quite frosty due to the holiday pay issue but he did not think that taking the extra week would be a big issue, particularly as there were no outstanding orders when he left for his holidays and the amount of work that came in over the Christmas period was low due to people still being on holiday.

[26] In supplementary questions and, I find, most likely in response to the brief of evidence filed by Mr Watanabe, Mr Panovski changed his evidence to say that he may have told another worker called Ralph rather than Mr Watanabe, that he was coming back on 15 January.

[27] Mr Watanabe gave evidence, which I entirely accept, that Mr Panovski did not tell him that he was intending to return to work on 15 January. Mr Watanabe said that he had expected that Mr Panovski would be returning to work when the business reopened on 8 January 2007. He was aware that Mr Panovski was very unhappy with his employment and he felt it was quite likely that Mr Panovski would not be coming back at all. Mr Watanabe said that there was absolutely no basis on

which Mr Panovski could have thought that it would be acceptable for him to come back a week after the rest of the staff.

[28] Mr Watanabe's evidence was a little unclear as to Mr Panovski's actions when they returned to the factory on 22 December. He thought Mr Panovski had left within about 5 minutes and may have said something like "Merry Christmas" as he went. Mr Watanabe had spoken to Mr Steers but could not recall Mr Panovski doing so. Mr Watanabe was more concerned with the job in hand that he had to perform rather than observing Mr Panovski's actions but I find that his evidence is not inconsistent with that of Mr Steers and his daughter. On balance therefore, I prefer their evidence to that of Mr Panovski and find that he did leave on 22 December without conveying any clear impression of his intention to return the following year.

[29] It was the evidence of Mr Steers and Mr Watanabe that when the factory reopened on 8 January they were busy. Mr Steers said that the defendant had some two months of work in hand. He also explained that as the work was for boats, the December/January period could be the busiest for the company. All the staff knew that the factory was opening on 8 January and Mr Panovski acknowledged that he knew this as well.

[30] When the week of 8 January came and Mr Panovski did not return to work, Mr Steers was unclear as to what Mr Panovski was intending but assumed that he had abandoned his employment. Mr Steers did not consider he had any obligation to contact Mr Panovski to ascertain the position. There is, however, a provision in the employment agreement which places this obligation on the employer.

[31] The following Monday, 15 January, Mr Panovski returned to work. This came as a considerable surprise, if not a shock, to Mr Steers. Mr Panovski claimed that Mr Steers said to him "*what the hell are you doing here*". Mr Steers denied using the word "*hell*". Mr Panovski claimed that he replied that he had come to work and that Mr Steers had responded "*you're no longer working here*", and then asked Mr Panovski to accompany him into his office. Mr Steers claims that he spoke quietly and simply asked Mr Panovski to come into his office.

[32] I find that it is more likely than not, in light of the confusion Mr Steers had as to Mr Panovski's intentions, that he said words to the effect that he thought Mr Panovski was no longer working there.

[33] When they went into the office Mr Steers asked Mr Panovski why he had not returned to work on 8 January and Mr Panovski replied that everyone has that week off and his wife was at home. Mr Panovski claims that he was simply told that he no longer worked there and was dismissed and Mr Steers would write him a letter. After he collected his personal effects he claims he returned to speak to Mr Steers and asked why he was being dismissed. It was at that point that he claims that Mr Steers explained how Ms K had visited him at home after they had broken up for Christmas and complained about the quality of the work Mr Panovski had done on the squabs he had delivered to her on 22 December. Mr Steers said he had refunded her the deposit that she had paid. Mr Panovski claimed that he told Mr Steers that he was making a mistake but he would not be begging Mr Steers to keep him on and then said "*Good luck to you sir*" and left.

[34] Mr Steers's account is substantially different. He claims that during the first and only meeting in his office on 15 January he told Mr Panovski about the episode with Ms K and how seriously he viewed the matter. He claimed that Mr Panovski made no comment to the matters he raised and suddenly got up and walked out the door saying "*okay I go find another job*" and went out the main entrance and he did not see him again.

[35] I find that both Mr Panovski and Mr Steers were in something of an emotional state at the time and, although both may have been attempting to tell the truth to the Court, neither account was entirely accurate. I find that Mr Steers did raise the complaint about Mr Panovski's work on the job for Ms K and that he did raise other examples of sub-standard work which was costing the defendant substantial amounts to the point where Mr Steers could no longer afford such lapses. I find that Mr Steers was preoccupied at the time by the consequences of Mr Panovski's failure to attend work the previous week, he was taken aback by Mr Panovski's appearance on 15 January and was unprepared to deal with him. This led to Mr Steers dismissing Mr Panovski summarily that day.

[36] That there was a dismissal is confirmed by a file note Mr Steers made at the time in which he had recorded that he had told Mr Panovski he was terminating his employment in terms of his employment contract for sub-standard work. Mr Steers confirmed the dismissal in a letter he wrote on 17 January, but which was dated 15 January. In that letter Mr Steers sets out, in some detail, Ms K's visit to his home on 22 December, her complaints about the work on the squabs and his claim that the job cost the defendant in excess of $5,000 and had had a severe impact on the defendant's financial viability and reputation. The letter stated there were other instances of poor finishing requiring reworking and referred to the work for Mr A. It stated that Mr Steers did not believe Mr Panovski's skills were up to the standard required for the industry and that this was affecting the defendant's financial viability and therefore Mr Steers had terminated his employment in accordance with the employment agreement as a "*serious offence*" of sub-standard work performance.

Determination of the Authority

[37] The Authority found Mr Steers had dismissed Mr Panovski on 15 January 2007. As to the justification for a dismissal alleging poor performance, the Authority cited *Ramankutty v The Vice-Chancellor of the University of Auckland* AC 53B/01, 25 October 2001. There Chief Judge Goddard held a performance dismissal required a full investigation with full participation by the employee after the perceived deficiencies have been pointed out, with a reasonable opportunity for the employee to improve the performance to a standard which was objectively measurable. It found this had not been done at the 6 December 2006 meeting. It observed that the complaint from Ms K on 22 December, conveyed by the client in person, was not discussed in any proper way with Mr Panovski before his dismissal. It found that the discussion on 15 January 2007 did not meet the requirements of a fair procedure. It found that the exchange was probably undermined fatally by Mr Steers's belief that the employment relationship had ended anyway so that he was not prepared for the kind of discussion necessary if he sought to raise Mr Panovski's performance in a disciplinary context. The Authority observed that Mr Steers should have taken the time to arrange a proper meeting and to address the problems in a considered way. It found that as a result Mr Steers's actions were not those of a fair

and reasonable employer in all of the circumstances at the time and therefore the dismissal was unjustified.

[38] As I have observed, these conclusions have not been challenged by the defendant and, in light of the evidence that I heard, I entirely agree with them.

[39] The Authority found that Mr Panovski was entitled to reimbursement of the remuneration he had lost as a result of his personal grievance. It observed that he had obtained new employment and had sought the reimbursement of 3 months lost remuneration. It found there was significant contributory fault on Mr Panovski's part. This consisted of the two main complaints that were discussed in some detail at the investigation meeting. The claim for reimbursement was reduced by a factor of 50 percent, producing the sum of $4,225.

[40] For compensation for injury to feelings, taking into account the evidence the Authority found of contributory conduct, $1,000 was awarded.

The evidence on remedies

[41] Mr Panovski gave evidence that he was deeply shocked by his dismissal and was ashamed and deeply embarrassed when seeing the other staff as he was leaving on 15 January 2007. He stated that he had found it very difficult to go home and tell his wife and two children that he had lost his job because of the quality of his work when the family knew that he took pride in his workmanship. He also found it hard letting his close friends know that he had lost his job and was embarrassed discussing it. He claimed he was finding it difficult to sleep, because he was worrying about the consequences of his dismissal and the consequent financial insecurity. He became depressed and found it hard to get back a sense of self belief and claimed that the sacking was the worst experience of his life. It was also a stressful time as they had to arrange a payment holiday on their mortgage which cost them $2,800 in extra interest.

[42] Mrs Panovska gave uncontested evidence that her husband was very upset and angry when he came home and told her that he had been fired because of some

work he had done on a job before Christmas. She confirmed he had trouble sleeping, and, instead of being positive and optimistic about life, he had become more depressed as time went by without another job. She said he had a sense of embarrassment and failure and it was a real blow to his self esteem and his sense of authority in the household. She said this was the most difficult time that they had experienced as a family in the 18 years of their marriage.

[43] In support of his claim for reimbursement Mr Panovski said he found himself having to find alternative employment at a very quiet time of year without the benefit of a reference. He claimed there were few opportunities in the first months. He obtained one interview but the employment opportunity never went any further. He claimed that this was because he had no written reference from the defendant or because of a negative oral reference from Mr Steers who he had no option but to offer as a referee. I accept Mr Steers's evidence that he did not give a negative oral reference and that he was never approached by any potential employer of Mr Panovski for a reference.

[44] Mr Panovski later obtained employment with another upholsterer, that time using his bank manager as a referee. This was at a lesser hourly rate than he was receiving with the defendant, $18 compared to $21. He calculated his remuneration loss for the period of 15 January until 14 May, when he commenced work with his new employer, at $14,280. After that, his differential loss was $120 a week, but he accepted that the date of his new employment was the appropriate date at which to quantify his loss.

The submissions

[45] Both counsel's submissions centred around s124 of the Employment Relations Act 2000 which states:

> ***124 Remedy reduced if contributing behaviour by employee***
>
> *Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—*
>
> *(a) consider the extent to which the actions of the employee contributed*

towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[46] In addition to the reimbursement of $14,208 for the lost income Mr Finnigan advised the Court that the plaintiff contended the more appropriate figure for hurt and humiliation was $12,000. The plaintiff sought interest on the sums that ought to have been awarded at 8 percent, together with costs. Mr Finnigan observed that the lost remuneration figure was reduced by 50 percent by the Authority but it was not clear whether that same level was applied in setting the award of $1,000 for distress and humiliation.

[47] Mr Finnigan submitted that the events preceding the dismissal were unrelated to the reasons for the dismissal and cannot now be contended for as contributory conduct. He said this was not a case where, but for the procedural inadequacies, Mr Panovski would have been justifiably dismissed. Even if Mr Panovski's work performance had been a legitimate concern of Mr Steers, a warning most probably would have addressed any issues and would have preserved Mr Panovski's employment. He submitted that Mr Panovski's concerns regarding the holiday pay issue had been resolved by the time he went on annual leave and that he had an expectation of ongoing employment which should have led to an award for the entire period of lost remuneration rather than 3 months.

[48] Mr Finnigan submitted the Authority erred in concluding there was any contributory conduct on the part of the plaintiff which had contributed towards the situation giving rise to his grievance. He submitted that it appeared from the Authority's determination that the contributory fault arose because of the complaints regarding Mr Panovski's work performance and these were undoubtedly a reference to Mr A's and Ms K's jobs. Mr Finnigan relied on the approach to contribution set out in *Paykel v Ahlfield* [1993] 1 ERNZ 334 which dealt with the equivalent section of the Employment Contracts Act 1991. This required: first, a determination of whether the employee had a personal grievance; second, whether there was a causal link between the conduct complained of and the personal grievance and third, a determination of the culpability or blameworthiness of that conduct. He also cited

Ark Aviation v Newton [2001] ERNZ 133 where, at paragraph [42], the Court of Appeal stated:

> *In our view, matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. They then will form part of the "situation which gave rise to the personal grievance" under ss40(2) and 41(3). There is no threshold under ss40 or 41 of the Act that requires such knowledge or awareness to derive exclusively from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of the dismissal.*

[49] He also cited from Judge Couch's decision in *Salt v Richard Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2006] 1 ERNZ 449, where he stated that it appeared from *Ark Aviation* that the reasons for the dismissal will be important in determining the scope of the evidence which is relevant to the issue of contribution under s124. Subsequently there has been a Court of Appeal decision in the *Salt* case, which I will refer to later ([2008] NZCA 128).

[50] Mr Finnigan accepted that as the dismissal was for poor work performance, if that could be established and was either significant or persistent, it might qualify as contributory conduct. However, the mere fact that there were one or two examples of poor workmanship would not qualify as culpability or blameworthiness on the part of the employee where there have been no performance warnings, unless the work performance could properly be described as gross negligence. He observed that in the *Paykel* case the Court accepted that the Tribunal had not erred in declining to reduce remedies where performance failures had not been the subject of warnings and the employee had not been given the opportunity to improve. To similar effect Mr Finnigan cited *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920.

[51] Mr Finnigan noted that the Authority had accepted Mr A's complaint had been discussed on 6 December, without any suggestion of a performance warning

with disciplinary action as a possibility. On 15 January the only major complaint was that of Ms K which was not discussed in any proper way with Mr Panovski before his dismissal. He also submitted that the matters relied on by the Authority did not have a causal connection to the personal grievance.

[52] Mr Finnigan submitted that an assessment of 33 percent contribution has been described as being "*at a relatively high margin*", citing *Golden v Northland District Health Board*, AC 32/07, 1 June 2007 and that in *Donaldson v Youngman* the Chief Judge had said that contributions of 50 percent or more should be very rare. The 80 percent contribution sought by the defendant, he submitted, was, as the Chief Judge had said in *Donaldson v Youngman*, imperceptible from 100 percent responsibility.

[53] Mr Finnigan then dealt with each of the issues pleaded by the defendant as going to contributory conduct. He submitted the late return from annual leave was not the reason for the dismissal but simply the occasion and not the cause of it. The late arrival for work on 22 December did not feature as a basis for the dismissal and a 40 minute delay could not qualify as contributory conduct. He observed that the incident concerning holiday pay on 21 December had not been pleaded and, had this been an issue of concern for Mr Steers, it was more likely that he would have dealt with Michael, who was responsible for the assault, than Mr Panovski. Mr Steers also had the opportunity to raise the matter the next day but did not mention it and it was not mentioned at the time of the dismissal.

[54] Mr Finnigan submitted the dismissal had some commonality with heat of the moment dismissals citing *Trust Bank Wellington Ltd v Lavery* [1995] 1 ERNZ 105 (CA). There, a finding that an employer dismissed "*in the heat of the moment, without justification*" was held to be inconsistent with a finding of contributory fault where the employee did not contribute in any way to the sudden dismissal.

[55] Mr Robinson for the defendant accepted the findings of the Authority on the remedies awarded to the plaintiff but, as an alternative, submitted that the reduction should be greater than the 50 percent determined by the Authority and should be at least 80 percent. He submitted that the events which constituted the contributory

conduct consisted of: poor workmanship and performance of the plaintiff discussed on 6 December in relation to Mr A's job; the incident on 21 December 2006 which constituted gross insubordination, intimidation and threatening behaviour; the incident on 22 December which demonstrated a total lack of trust and respect shown by the plaintiff to the defendant; the substandard workmanship in relation to Ms K's job; the failure to return to work as expected and required on 8 January, and the incident on 15 January. The last matter was not developed in Mr Robinson's submissions and I take it to relate to the claim that Mr Panovski walked out on 15 January. I have found he was dismissed and therefore will not refer to this aspect again.

[56] Mr Robinson accepted that the letter of 15 January did not accurately reflect the position and could be disregarded as it was sent after the termination of the relationship. Mr Robinson also relied on the *Paykel Ltd* and *Macadam* cases and *Donald v Mason Services Ltd* [1998] 2 ERNZ 346 where wilful and antagonistic behaviour by an employee, which eventually provoked an assault on him by a fellow employee, was held to be contributory conduct.

[57] On the issue of causation he submitted that the events complained of were causative and at the forefront of the mind of the employer when the action giving rise to the personal grievance took place. It was not relevant that the employee's behaviour had not contributed to the precise aspect of the employer's behaviour such as the process the employer adopted, which was found to be unjustifiable. He observed that misconduct which is sufficiently grave may unsettle an employer into acting precipitously.

Conclusions

[58] Section 124 requires the Authority or the Court, once it is determined there is a personal grievance, as a first step in deciding both the nature and extent of the remedies to be provided, to consider the extent to which the actions of the employee have contributed towards the situation that gave rise to the personal grievance. The actions of the employee must be considered if they contributed, not to the actual dismissal itself, but to the situation that gave rise to the unjustifiable dismissal claim.

The second step requires the Authority or the Court to have regard to questions of causation in determining the extent to which the employee's actions contributed to the situation, which in turn gave rise to the dismissal. If there was no causal link between the employee's conduct and the situation that gave rise to the dismissal, there can be no reduction in the remedies.

[59] The majority of the Court of Appeal in *Salt* held that if, for example, an employer discovers after the dismissal that the employee had been guilty of serious misconduct, previously unknown, which would have justified a dismissal, that conduct cannot be taken into account under s124. Such conduct could, however, affect the remedies to be awarded under s123, as a matter of equity and good conscience in settling the grievance.

[60] As to what constitutes the "*actions*" of the employee this includes the behaviour or conduct and whatever the employee has done or not done, see *Nelson v British Broadcasting Corporation (No 2)* [1980] ICR 110 at 120, cited in *Paykel* at p337. In examining the employee's actions at this point anything the employee has done or not done must be considered and the causal link between such actions and the situation giving rise to the personal grievance established. However, the actions must be proven, on the balance of probabilities, for at this point in the enquiry the Authority or the Court is no longer considering under s103A whether the employer's actions were justified but whether the proven actions of the employee contributed to the situation which gave rise to the personal grievance.

[61] The third step that the Authority or the Court must take if it has found there was a causal connection between the actions and the situation that gave rise to the dismissal, is to consider whether those actions require the remedies, that would otherwise have been awarded, to be reduced. The actions that require a reduction in remedies may be loosely categorised as being culpable or blameworthy, for if the employee's actions were blameless, it cannot be just or equitable to reduce the award because of those actions. These actions can include any conduct which amounts to a breach of the employment agreement or a tort or actions which, as Brandon LJ stated in the *Nelson* case, were:

> *…perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.* Cited in *Paykel* at p339.

[62] Where the Authority or the Court has taken all these steps it may conclude that the actions of the employee were so blameworthy that the remedies that would otherwise have been ordered should be reduced to nil or it may conclude that, although the actions contributed to the situation which gave rise to the grievance, they were insufficiently blameworthy to require any reduction of the remedies.

[63] The majority Court of Appeal judgment in *Salt* held that s124 was intended to operate like a "*contributory negligence*" provision:

> *[79] … if the employee, by his or her own behaviour, is partly the cause of the employer's hasty or ill-judged action (here, in dismissing the employee), then the employee should have the remedies to which he or she would otherwise have been entitled reduced.*

[64] I turn now to Mr Panovski's actions relied on by the defendant to show contributory conduct and must determine whether there is a causal connection between them on the situation that gave rise to his grievance and whether the actions are sufficiently blameworthy to warrant a reduction in the remedies.

[65] I heard extensive evidence from Mr Panovski and Mr Steers as to whether Mr Panovski's workmanship in relation to Mr A's and Ms K's jobs was unsatisfactory. No independent expert evidence was given and I am unable to determine, with any degree of accuracy, whether Mr Panovski's work was unsatisfactory. I accept Mr Steers's evidence that the two customers had reached that conclusion, and Mr Steers had acted on it in respect of Ms K's complaint by refunding her deposit.

[66] There are major difficulties in finding these matters had a causal connection with the situation that gave rise to the grievance. On Mr Steers's own evidence at

the 6 December meeting he did not regard the discussion concerning Mr A's job as amounting to either a complaint or a warning to Mr Panovski of poor workmanship that needed to be remedied. The only matter he says he discussed, with a view to improving performance, was the time Mr Panovski spent doing his work.

[67] I accept Mr Finnigan's submission that there was no independent evidence given concerning the workmanship on Ms K's job and agree with the Authority's conclusion that this matter was not properly put to Mr Panovski on 15 January. Although Mr Steers may have had some concerns about Mr Panovski's workmanship at that point of time, had it not been for the other surrounding circumstances, at worst, this matter might have resulted in a warning to Mr Panovski to improve his work performance. I find that the complaints about workmanship although they were given by Mr Steers at the time to be the reasons for the dismissal, were not sufficiently serious to amount to culpable misconduct which would justify any reduction in the remedies.

[68] The matters of real substance were Mr Panovski's conduct on 21 December and his failure to return to work on 8 January. His conduct on 22 December is also relevant, but less so. Even though the conduct on 21 December was not expressly pleaded, it formed a central part of the evidence and the submissions advanced by Mr Robinson. I therefore did not understand Mr Finnigan to contend that he had in any way been taken by surprise.

[69] Based on the credibility findings I have made, Mr Panovski's actions on 21 December in confronting both Ms Steers and then Mr Steers with the allegation that they had ripped him off and his angry and insolent manner, which he maintained after Michael's assaults on Mr Steers, amounted to serious misconduct which, if it had been properly dealt with in a disciplinary context, may well have justified, in terms of s103A of the Act, Mr Panovski's dismissal.

[70] I accept the force of Mr Finnigan's criticism that no steps were taken by Mr Steers at that stage to institute disciplinary proceedings against Michael or Mr Panovski for their behaviour in his office. Michael's actions were clearly far more serious and involved two actual assaults on Mr Steers.

[71] The situation with Michael may be explained by Mr Steers's evidence, which he gave while showing considerable emotion, that Michael, who he said was an excellent tradesman who had been with him for a number of years and did not leave until early this year, suffered from a mental condition which may have led to his agitation on the day. Mr Steers gave evidence that Michael came to him the following morning and apologised for his behaviour and said that he had been wound up by Mr Panovski and had simply snapped. Mr Steers accepted Michael's apology.

[72] It may be that because of the subsequent events, Mr Steers did not have an adequate opportunity to pursue the matter of Mr Panovski's behaviour at that time. To have done so on the day when the situation was still volatile would have been unwise. Subsequent events would have prevented him from taking any steps that he might have wished to take.

[73] On 22 December, without explanation, Mr Panovski was late to work. I have found, again based on my findings of credibility, that he left work that day without giving any indication that he was returning the following year. I find also that his demeanour had led Mr Steers and other employees of the defendant to conclude that Mr Panovski was not intending to come back in the new year. His failure to return to work on 8 January, again without explanation, consultation or the agreement of Mr Steers, would have confirmed this impression. That failure was also blameworthy conduct, although perhaps not serious enough in itself, if it had not been for the context in which it had occurred, to have justified a dismissal in terms of s103A. It is, however, I find, blameworthy conduct which must be taken into account under s124 in determining the extent of the reduction of the remedies that would otherwise have been awarded.

[74] I am satisfied that Mr Panovski's actions on 21 and 22 December and 8 January clearly contributed to the situation that gave rise to the grievance. Without Mr Panovski's conduct on those days Mr Steers would not have been surprised and somewhat shocked by his appearance on 15 January and would not have acted in a precipitant way in dismissing him for work performance issues alone. Because the actions on 21 December were alone sufficient to have warranted a dismissal, their

combined effect must be to place them at the higher end of the percentage scale. The Authority's determination of 50 percent was based largely on findings of poor workmanship which I have put to one side. On my view of Mr Panovski's actions, however, I consider a reduction of 50 percent of the remedies which would otherwise have been awarded, is still warranted.

[75] Turning now to the remuneration award, I observe that the plaintiff, in his statement of problem to the Authority, sought 3 months' reimbursement. At the hearing of the challenge Mr Panovski sought approximately 4 months, that is between 15 January and 14 May at $840 gross per week. The evidence raised an issue as to whether Mr Panovski had taken adequate steps to mitigate his loss. He made a total of 4 job applications, the fourth of which was successful. As Mr Robinson submitted, and put to Mr Panovski in cross-examination, there are a large number of firms engaged in the upholstery business in Auckland but Mr Panovski appeared to rely only on advertised jobs and did not actively seek positions at any of those firms. There was also an issue as to the earnings Mr Panovski received from any private upholstery work he carried out. It was acknowledged that he did do some work for friends on a cash basis. I am left in some considerable doubt as to whether Mr Panovski did adequately mitigate his loss and note that he has given no account at all for any other earnings during the period. In these circumstances I decline to exercise my discretion under s128(3) to order more than 3 months' ordinary time remuneration. But for the reduction for contributory conduct, I would therefore have awarded 12 weeks at $840 gross per week, making a total of $10,080 which, reduced by 50 percent, leaves an award of $5,040 gross.

[76] I turn now to the award of compensation for humiliation, loss of dignity and injury to feelings in terms of s123(1)(c)(i) of the Employment Relations Act 2000. Mr Finnigan sought an award of $12,000 under this head. I am satisfied from the evidence of Mr and Mrs Panovski that he did suffer considerable distress and humiliation by the way in which the dismissal was carried out although I consider his main emotion at the time was anger. In a real sense he did contribute to this by unilaterally turning up a week late when he had left under a considerable cloud as a result of his own conduct prior to Christmas. However, contributory conduct should not be used twice, both in setting the quantum of the compensation award and then

in reducing it. But for the contributory conduct, I would have awarded Mr Panovski $8,000 under this head. Applying the contributory conduct reduction, that award becomes $4,000.

[77] The challenge has been successful to this extent and, in terms of s183(2) the total awards of $9,040 now stand in the place of the awards of the Authority which totalled $5,225 before tax.

[78] Mr Finnigan sought interest at the rate of 8 percent on the awards sought on behalf of the plaintiff. This was sought from 26 July 2007 until payment. Credit was given for the payment by the defendant of the Authority's awards of $4,396.98, presumably after tax, on 13 September 2007. I award interest on the difference between the Court's awards and those of the Authority namely $3,815 before tax, at the rate of 8 percent per annum, from 26 July 2007, being the date of the Authority's determination, down to the date of payment.

Costs

[79] At the request of counsel, costs are reserved. If they cannot be agreed then the first memorandum as to costs should be filed and served within 60 days from the date of this judgment with the memorandum in response to be filed within a further 30 days.

B S Travis
Judge

Judgment signed at 3pm on Friday 25 July 2008