

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 121  
5417653

BETWEEN           BADEN RAWLE  
                          Applicant

AND                   SCOTT & RICKETTS LIMITED  
                          t/a MITRE 10 MEGA  
                          Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Piers Hunt, for the Applicant  
                              Gary Tayler, for the Respondent

Investigation Meeting:   28 August 2013 at Napier

Determination:          30 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Baden Rawle applied for a position with Scott & Ricketts Limited t/a Mitre 10 Mega (Mitre 10 Mega) on 28 November 2012. He was asked to complete an application form, part of which requested information about criminal convictions. Mr Rawle says he answered that question honestly by declaring that he had convictions.

[2]     Mr Rawle was interviewed for the position, but was not successful. Ten days later Mitre 10 Mega contacted him about a different position that had arisen in another area of the store. He was offered, and accepted, that position following an interview.

[3]     Mr Rawle started his employment on 21 December 2012. In January 2013 he signed a form authorising his employer to obtain his criminal record from the Ministry

of Justice. Mr Rawle continued working at Mitre 10 Mega without incident until 6 March 2013.

[4] On that day he was approached by the Branch Manager, Rodger van der Gulik, who gave Mr Rawle a letter notifying him of a meeting he was to attend the following day. Information concerning Mr Rawle's criminal convictions had recently been received from the Ministry of Justice and Mr van der Gulik wanted to discuss this information. The letter referred to the seriousness of the issue and informed Mr Rawle of the possible implications for his continued employment.

[5] At Mr Rawle's request, the meeting was delayed and took place on Monday, 11 March 2013. Mr Rawle was represented at the meeting which, following discussion, was adjourned for approximately 2 weeks.

[6] On 26 March 2013 Mr Rawle was dismissed without notice for failing to disclose all of his previous convictions.

[7] Mr Rawle claims he was unjustifiably dismissed and that his employer breached good faith. At the investigation meeting Mr Rawle's advocate clarified that the breach arose from the employer's failure to take written notes at Mr Rawle's second employment interview. Mr Rawle seeks compensation for hurt and humiliation and compensation for lost wages.

[8] Mitre 10 Mega denies breaching good faith and says Mr Rawle's dismissal was justified in all the circumstances. It says that Mr Rawle did not disclose, either on the application form for employment, or in an interview for the position he obtained, all of his convictions as he was required to do.

[9] Mitre 10 Mega says the process it followed was thorough and robust and that it was justified in dismissing Mr Rawle.

[10] The parties attended mediation but were unable to resolve the matter.

## **Issues**

[11] The issues for the Authority to determine are:

- (a) Whether Mitre 10 Mega was justified in dismissing Mr Rawle over his failure to disclose one or more criminal convictions in the application for employment form he completed; and
- (b) Whether there was a breach of good faith by Mitre 10 Mega towards Mr Rawle.

### **The law**

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

[13] In applying the test, the Authority must consider a number of factors specified in s.103A (3) that relate to the process followed by the employer. It may also consider any other factors it considers appropriate.

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

[15] Parties to an employment relationship are required by the provisions of s. 4 of the Act to deal with each other in good faith. This includes not doing anything, either directly or indirectly, that will, or is likely to, mislead or deceive the other party.

[16] The duty of good faith imposes a number of obligations on the parties to an employment relationship. These include being active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

### **Background facts and evidence of the parties**

[17] On 28 November 2012, Mr Rawle completed and signed a Mitre 10 Mega employment application form. The 5 page form ended with a "*Declaration & Consent*" section that, amongst other matters, required Mr Rawle to:

- a. Declare that to the best of his knowledge the information he had provided in the application form and in any attached resume was accurate;

- b. Signify his understanding that if he gave any false or misleading information, or suppressed any material fact, he would not be employed or, if he was employed, his employment would be terminated without notice; and
- c. Consent to the Company seeking criminal conviction checks and credit checks where applicable.

[18] On 19 December 2012 Ms Parker made a written offer of employment to Mr Rawle which he accepted on 21 December 2012. Her letter made the offer "*subject to the results of the Justice Department Criminal records check and...* (other matters not relevant here)".

[19] Attached to the letter was the Ministry of Justice Criminal Records check form, that Mr Rawle was asked to sign and return with a copy of his drivers' licence or passport. Also attached was an employment agreement.

[20] Mr Rawle gave evidence on his own account. He was adamant that he disclosed all three of his convictions at the interview for the job for which he was successful. He did not intend to deceive the employer or attempt to hide his criminal history and said that would have been futile as he knew his employer would be checking his convictions with the Ministry of Justice.

[21] The employment application form completed by Mr Rawle was amongst the evidence before the Authority. The relevant section is reproduced below, complete with Mr Rawle's responses. He circled his initial answer, and the detail he provided is in italics:

**Have you any Criminal convictions of any kind** (not including any concealed under the Clean Slate Act)  Yes  No  
 (please detail for what and when including but not limited to: fraud, forgery, stealing, assault Battery, Weapons)

*Failing to obey officers requests*

[22] Although the space provided for responses to the question was not generous, there was easily sufficient space for Mr Rawle to include information about his conviction for wilful damage. There was also space to make clear that the response he did give covered more than one conviction.

[23] According to Mr Rawle, the convictions referred to as examples on the application form were serious crimes, none of which applied to him. He considered

his offences were relatively minor. He had *"two convictions for pretty much the same thing and as both the words "Officers" and "requests" were in the plural I meant to convey that there was more than one."*

[24] Mr Rawle told the Authority that, in his view, the fact that he had declared convictions on the form was more important than recording the detail of them. He expected to be fully questioned about them if he reached the interview stage of the recruitment process.

[25] Mr Rawle acknowledged that he overlooked recording on the application that he also had a conviction for wilful damage. In his evidence he referred to it as *"a very minor matter approximately 5 years previously that had been a reckless act but not one with intent to damage."* He regarded his failure to record it on the form as an oversight with no intention to deceive, or to hide it from, Mitre 10 Mega.

[26] Mr Rawle said his criminal convictions were not raised in his interview for the first position, for which he was unsuccessful. They were raised in the interview for the second position some days later. At that interview he said he fully disclosed all 3 of his convictions including that for wilful damage.

[27] He said he had been served documents early one morning at his residence by a document server. The documents were in relation to another person and Mr Rawle had followed the document server back to his car and put the documents down forcefully on the bonnet of his car, denting it. That was the background to his conviction for wilful damage.

[28] Two of the 3 witnesses who gave evidence for Mitre 10 Mega had taken part in Mr Rawle's interview for the position to which he was subsequently appointed. One, Sheree Parker, the Administration Manager for the branch, had taken part in both of Mr Rawle's interviews. Sean Sutherland, the manager for the department in which Mr Rawle was employed, took part in only the second interview.

[29] Ms Parker and Mr Sutherland had each prepared a one paragraph brief of evidence which was filed in the Authority and served on Mr Rawle before the investigation meeting. Most of the evidence given by each of them was oral, given in the course of the investigation meeting.

[30] Their written briefs of evidence simply stated that, during Mr Rawle's recruitment process, he had made them aware of only one previous criminal conviction. They had become aware of his other convictions only when Mitre 10 Mega received a report from the Ministry of Justice.

[31] On the application of Mr Hunt, I made an order for the exclusion of witnesses. Accordingly, Mr Sutherland did not hear Mr Rawle's evidence and Ms Parker did not hear Mr Rawle's or Mr Sutherland's evidence.

[32] Mr Sutherland said that at the job interview he had attended with Ms Parker he had asked Mr Rawle about the criminal conviction he had declared on his application form. Mr Rawle had told him of a bailiff coming to his house early one morning and serving documents on him. Mr Rawle had protested that he was not the person sought by the bailiff and had argued with him and tried to return the documents. As a result he was convicted of "*Failing to obey officers requests*".

[33] Mr Sutherland was certain that Mr Rawle had not mentioned wilful damage or banging documents down on a car bonnet. He did not take part in many interviews for his employer and, apart from Mr Rawle's interview, had participated in only one other interview for the position. Although he had not taken notes of the interview he was "*110% sure*" that the only criminal conviction Mr Rawle had talked about in response to his question was the incident with the person serving documents on him and that was for failure to obey requests.

[34] He said Mr Rawle had come to see him on the afternoon he had received Mr van der Gulik's letter of 6 March 2013 requiring a meeting to discuss his criminal convictions. Mr Rawle had asked Mr Sutherland if he recalled him talking about his convictions in his job interview. Mr Sutherland had recounted his recollection from the interview, which included Mr Rawle's account of failing to obey an officer.

[35] Ms Parker was also certain that Mr Rawle had at no time during his second interview mentioned wilful damage or putting documents down forcefully on the bonnet of a document server's vehicle. Her account of the explanation given about the conviction Mr Rawle had noted on the application form accorded with Mr Sutherland's recollection.

[36] Under cross-examination Ms Parker was asked why she did not ask further questions of Mr Rawle about his response to the criminal conviction question on the

employment application form. She replied that she was satisfied with his explanation when he was asked about his conviction for "*failing to obey officers requests*". He had talked about a bailiff serving documents on him early one morning, and his not wanting to accept them, which led to his conviction. She had accepted his explanation "*as gospel*" and made no further enquiries until the Ministry of Justice report arrived when she informed Mr van der Gulik.

[37] Ms Parker also recalled Mr Rawle saying that he did not have a drivers' licence but says she was unaware that he had lost his licence indefinitely. Ms Parker acknowledged that Mr Rawle had noted on the application form that he did not have a current licence. She knew he was a cyclist and had not thought it odd that he did not hold a licence and therefore did not think to question him about it. She only realised he had lost his licence through a conviction on receiving the Ministry of Justice print out.

[38] Ms Parker confirmed that she took no notes of Mr Rawle's second interview and that it was not her practice to do so. As the Administration Manager, she took part in most staff employment interviews. She estimated there to have been between 15 and 20 interviews in the first 3 months of 2013. She was very confident of her ability to recall Mr Rawle's second interview.

[39] Mr van der Gulik took no part in the second interview process although he had met Mr Rawle before that interview. Mr van der Gulik said his business did not have a policy against employing people who had criminal convictions. That was evident from its employment of Mr Rawle when the employer believed he had only one conviction for which he had provided a satisfactory explanation.

[40] He said it depended on the seriousness of the crimes and the person's explanations for the convictions. Mr van der Gulik said that, if Mr Rawle had declared all 3 of his convictions, the process would not have gone further.

[41] Mr van der Gulik said he found Mr Rawle's explanation of his failure to disclose all of his convictions "*unconvincing*". He did not accept Mr Rawle's view that 2 of his convictions were essentially the same, and noted that they were different convictions for totally unrelated events. Both of those convictions should have been declared on the application form as well as the conviction for wilful damage.

[42] Faced with consistent evidence from Ms Parker and Mr Sutherland that Mr Rawle had not disclosed a conviction for wilful damage during his second interview, Mr van der Gulik said he had assessed the evidence of all 3 employees. He preferred Ms Parker and Mr Sutherland's evidence to that of Mr Rawle. These were factors he took into account in deciding to dismiss Mr Rawle which he said he did following a full and fair investigation.

[43] The letter of dismissal he gave Mr Rawle stated Mr van der Gulik's belief that Mr Rawle had not ever disclosed his other 2 previous convictions either on the application form or at the interview stage. This brought into doubt the trust and confidence between an employee and employer. He had considered the whole situation including Mr Rawle's explanations before arriving at the decision to dismiss Mr Rawle.

### **Discussion and findings**

[44] Mr Rawle was aware from the "*Disclosure and Consent*" section of the employment application form that he would be putting his potential employment with Mitre 10 Mega at risk if he gave false or misleading information, or suppressed any material fact in completing the form. He also knew that the offer of employment from Mitre 10 Mega was subject to the Ministry of Justice criminal records check.

[45] I find that when Mitre 10 Mega received information from the Ministry of Justice showing the extent of Mr Rawle's criminal convictions it conducted a fair investigation in which Mr Rawle was accorded ample opportunity to participate and to be heard.

[46] Mr van der Gulik informed Mr Rawle clearly of the matter to be discussed in the meeting of 11 March 2013. He made him aware that the matter was serious and could result in disciplinary action which could result in his employment being terminated.

[47] He provided Mr Rawle with a copy of the Mitre 10 Mega "*Employee Rights – Disciplinary Process*" document which specified what his entitlements were throughout the process. These included having a support person or representative of his choice present at any discussions. Mr van der Gulik referred to that information at the beginning of the 2 disciplinary meetings of 11 and 26 March 2013.

[48] Mr Rawle had the opportunity to obtain representation before the first meeting took place. During the meeting, when he raised a matter relating to a conversation he had recently had with Mr Sutherland, which Mr Rawle thought would verify statements he had made, Mr van der Gulik adjourned the meeting temporarily to call Mr Sutherland in to join it. He allowed Mr Rawle to question Mr Sutherland directly over the matter.

[49] At the end of the discussion, Mr van der Gulik adjourned the meeting to allow time for reflection and to make a decision on Mr Rawle's continued employment. He decided he needed more time to consider all the information and, as Mr Rawle was about to go on scheduled leave, he adjourned the meeting until after Mr Rawle's return some 2 weeks later.

[50] Mr van der Gulik weighed up the evidence he had heard during the investigation meeting and made an assessment that he preferred the evidence of Ms Parker and Mr Sutherland to that of Mr Rawle.

[51] When the meeting reconvened on 26 March 2013 Mr Rawle's representative was not available. Mr Rawle was again informed of his rights as an employee. He was then invited to make any further statement that could influence his employer's final decision. When Mr Rawle indicated there was nothing more that he wished to add, Mr van der Gulik confirmed his decision to terminate Mr Rawle's employment and provided the necessary details about final pay arrangements.

[52] I find that Mr van der Gulik made his decision in a considered manner. He was not present during Mr Rawle's second interview when the matter of criminal convictions was discussed. However, having heard from all three employees present at that interview, and allowed direct discussion between 2 of them, he was entitled to make an assessment as to whose evidence he preferred.

[53] Having heard evidence from Mr Rawle, Ms Parker and Mr Sutherland during the course of the investigation meeting, I note that I would have come to the same conclusion in terms of preferring the evidence of Ms Parker and Mr Sutherland over that of Mr Rawle with regard to his non-disclosure of his conviction for wilful damage.

[54] The Ministry of Justice records showed that the conviction for wilful damage occurred in September 2009, which was 3 years and 3 months before he applied for a

position at Mitre 10 Mega. Mr Rawle's reference to the conviction in his evidence as having occurred "*approximately 5 years previously*" is an exaggeration that undermines his credibility.

[55] Mr van der Gulik's conclusion that Mr Rawle did not disclose information about all of his convictions is one that a fair and reasonable employer could reach. While Mr Rawle may have disclosed some information that was relevant to the incident that led to his conviction for wilful damage, he put it in the context of "*failing to obey officers requests*". He did not disclose information about all 3 of his convictions.

[56] The Ministry of Justice record shows that Mr Rawle's 2 separate convictions that resulted in driving disqualifications and other penalties each had elements of failure to obey an officer's request. The wilful damage conviction did not.

[57] Mr van der Gulik was not present during Mr Rawle's second interview when the criminal conviction he had disclosed on the application form was discussed. However, having conducted a fair investigation that allowed Mr Rawle the opportunity to be heard and to have his explanation and perspective considered, I find it reasonable for Mr van der Gulik to have relied on the consistent evidence of Ms Parker and Mr Sutherland in coming to the decision that he made.

[58] I have considered Mr Hunt's claim that Mitre 10 Mega breached good faith by the failure of Ms Parker and Mr Sutherland to take written notes during Mr Rawle's second interview. While it would undoubtedly be good practice to do so, particularly for Ms Parker who participates in many such interviews, it cannot be a breach of good faith not to do so.

[59] The obligations of good faith apply to parties to an employment relationship as defined by s. 4 (2) of the Employment Relations Act 2000. Prospective employees are not included in the list of relationships that are covered by good faith. At the time of his second interview Mr Rawle was simply a prospective employee who had not been offered or accepted an employment agreement. Accordingly I reject that claim.

### **Determination**

[60] Mr Rawle does not have a personal grievance. He was justifiably dismissed by his employer following a fair investigation of whether he had failed to disclose all

of his previous convictions, either on the employment application form he completed, or at a job interview.

[61] There was no duty of good faith owed by Mitre 10 Mega to Mr Rawle at the time of his interview for a position with the company, and accordingly no breach of that duty.

**Costs**

[62] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority