

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 1  
3054752

BETWEEN

RAFE FANNIN  
Applicant

AND

LIDDINGTON ELECTRICAL  
LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Amelia Brookland, advocate for the Applicant  
Shelley Kopu, counsel for the Respondent

Investigation Meeting: 6 November 2019 and 2 December 2019 at Whangarei

Submissions [and further Information] Received: 31 October 2019 and 9 December 2019 from the Applicant  
31 October 2019 and 16 December 2019 from the Respondent

Date of Determination: 7 January 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Rafe Fannin was not dismissed, he voluntarily resigned from his employment. Accordingly, he does not have an employment relationship problem.**
- B. Costs are reserved.**

**Employment Relationship Problem**

**Liddington Electrical Limited**

[1] The respondent, Liddington Electrical Limited (Liddington Electrical) is an electrical services company which has operated its business in Whangarei, since 1987. It has a client base which includes government agencies for which security is very important. Mr David Liddington and his wife, Mrs Christine Liddington are both directors of Liddington Electrical.

Mr Liddington is the Chief Executive Officer. Mrs Liddington is responsible for the administrative side of the business.

[2] The applicant, Mr Rafe Fannin was employed by Liddington Electrical as an apprentice electrician from August to November 2018. Mr Fannin says when discussing his employment agreement in mid-November 2018, his criminal convictions came up. There were heated discussions between Mr Liddington and Mr Fannin on 20 and 21 November 2018 about Mr Fannin's criminal convictions. Mr Fannin says Mr Liddington swore at him and acted in a manner which he says amounted to a dismissal, which in the circumstances was unjustified.

[3] Mr Fannin says he suffered hurt and humiliation as a result of his unjustified dismissal which was aggravated by actions taken by Mr Marcus Damerell who is a friend of Mr Liddington's. He says Mr Damerell distributed pamphlets in his neighbourhood about him which he considered to be defamatory. Mr Fannin seeks compensation for the hurt and humiliation he says he suffered.

[4] Liddington Electrical disputes Mr Fannin's claims. It says Mr Fannin has serious criminal convictions which he failed to disclose at the job interview when asked by Mr Liddington. When Mr Liddington became aware of the criminal convictions, Mr Fannin attempted to negotiate an exit from Liddington Electrical in a manner that Mr Liddington considered amounted to blackmail. Mr Fannin resigned before Mr Liddington was able to properly consider the situation.

### **Mr Fannin's version of events**

[5] Mr Fannin has criminal convictions for credit card fraud and identity theft while employed as a teacher at Auckland Grammar School. In February 2016, Mr Fannin was sentenced to 9 months home detention and ordered to repay just over half of the money which had been fraudulently obtained by him. He served his sentence before he commenced employment at Liddington Electrical.

[6] Mr Fannin says at his interview with Mr Liddington for the job, he was not asked whether he had criminal convictions and so he chose not to disclose them. Mr Fannin was offered and accepted the job with Liddington Electrical. Mr Fannin says he finally received an employment agreement on 16 November 2018, despite having requested one on numerous occasions during his 3 months of employment.

[7] Mr Fannin took the employment agreement home to read. On 20 November 2018, Mr Fannin told Mr Liddington there was a problem with signing the agreement because he had criminal convictions. Mr Fannin and Mr Liddington disagree on the contents of their conversations on 20 and 21 November 2018 regarding Mr Fannin's convictions and ongoing employment. Mr Fannin says he was open with Mr Liddington about his convictions but that Mr Liddington formed the view that Mr Fannin could no longer continue working for him, as he could not trust him.

[8] Mr Fannin says when faced with this response he attempted to come to an arrangement with Mr Liddington whereby he would voluntarily resign if Mr Liddington agreed to sign off his remaining job units so he could complete his apprenticeship and set up his own business as an Electrician. Mr Liddington refused Mr Fannin's request and heated conversations ensued about aspects of the employment agreement which Mr Fannin was unhappy about. Mr Fannin says this resulted in Mr Liddington telling him "Well if that is your attitude you can fuck off now."

[9] Mr Fannin took this to mean he had been dismissed. He says he went home and recorded his version of events. On the evening of 21 November 2018, he sent an email to Mr Liddington stating that he believed he had been dismissed unjustifiably. Mr Fannin informed Mr Liddington that he would be returning his uniform the next morning.

### **Liddington Electrical's version of events**

[10] Mr Liddington says he definitely did ask Mr Fannin if he had criminal convictions when he interviewed him for the role and Mr Fannin's response was that he did not. This was one of many disputes in the evidence between the parties.

[11] Mr Liddington says it was when they discussed the employment agreement on 20 November 2018 that Mr Fannin disclosed for the first time that he had "minor criminal convictions for credit card fraud". Mr Liddington says he was shocked because he had specifically asked Mr Fannin whether he had criminal convictions when he interviewed him and was told that he did not. Mr Liddington said he told Mr Fannin that the Ministry of Justice forms needed to be completed because of the work Liddington Electrical undertook for a number of government agencies. Mr Fannin asked what was to happen and Mr Liddington told him he needed to think about the situation.

[12] That evening Mr Liddington did a google search of Mr Fannin's name and discovered that his convictions were not minor, but serious.

[13] On 21 November 2018, Mr Liddington says Mr Fannin attempted to underplay the severity of his convictions, claiming they were "just credit card fraud". Mr Liddington told him he had "googled" him and that the convictions were very serious.

[14] Mr Fannin said to Mr Liddington that if he agreed to sign off his remaining job units to complete his apprenticeship, Mr Fannin would voluntarily resign and "go quietly". Mr Liddington says he was not prepared to sign off the units when they had not been completed. Mr Liddington was of the view Mr Fannin was attempting to blackmail him. He says Mr Fannin became angry and demanded to know what was going to happen. Mr Liddington says he did not know what to do and told Mr Fannin he needed to think about the situation and would get back to him. Mr Fannin followed Mr Liddington into the kitchen at Corys Electrical and made claims about the employment agreement and that it was not correct. Mr Liddington denies making the statement: "Well if that is your attitude you can fuck off now."

[15] Mr Fannin returned to work for the day but informed his colleague Mr Steve Anderson with whom he had been working that he would not be returning to work the next day. Mr Fannin sent Mr Liddington a letter on the evening of 21 November 2018 setting out his version of events and stating he felt he had been unfairly dismissed.

[16] Mr Liddington says before he was able to discuss the matter further with Mr Fannin he received a letter on the morning of 22 November 2018, from Mr Fannin claiming unjustifiable dismissal and seeking remedies. He immediately informed Mr Fannin that he had not been dismissed and was still an employee. Mr Fannin did not return to work.

### **The investigation meeting**

[17] The investigation meeting into Mr Fannin's claims took one and a half days in the Authority. The investigation meeting on 6 November 2019 was adjourned after a full day. This was because further evidence arose during the investigation meeting. The Authority requested various documents to be produced and for a further two witnesses to be summonsed. The investigation meeting resumed on 2 December 2019 for half a day.

[18] Mr Fannin filed a witness statement as did his wife, Mrs Hitomi Fannin, and his mother, Mrs Colleen Fannin.

[19] For Liddington Electrical, Mr David Liddington and his wife, Mrs Christine Liddington, each filed witness statements. Mr Steve Anderson, an electrician employed by Liddington Electrical, also filed a witness statement. The Authority summonsed a friend of Mr Liddington's, Mr Marcus Damerell, Mr Fannin's immediate past employer Mr Stacy Hyndman and Mr Eric Beazley from Corys Electrical.

[20] Each of the witnesses giving evidence before the Authority either swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[21] As permitted under s 174E of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence or submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

### **The issues**

[22] The issues for determination by the Authority are as follows:

- (a) Was Mr Fannin dismissed?
- (b) In the event that Mr Fannin was dismissed, was it unjustifiable?
- (c) If Mr Fannin was unjustifiably dismissed, what remedies are available to him?

### **Credibility**

[23] This matter is to be determined on issues of credibility. On numerous occasions the evidence of Mr Fannin and for Mr Fannin was in stark contrast to that of Mr Liddington and the witnesses for Liddington Electrical. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is.

[24] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. This exercise has been challenging because on almost each relevant fact, Mr Fannin and Mr Liddington were in dispute.

[25] However, there are some significant areas in which Mr Fannin's evidence was not plausible. One example of this is as follows.

[26] On the first day of the Authority's investigation meeting on 4 November 2019, in response to questioning by the Authority, Mr Fannin said he had a good relationship with his former employer, Mr Hyndman of 360 Electrical. Mr Fannin described Mr Hyndman as a friend from the local Cricket club who was aware of the extent of Mr Fannin's offending and employed him, despite this. Mr Fannin told the Authority that he had been made redundant and had received a positive reference from Mr Hyndman. Mr Fannin was asked to provide the Authority with a copy of the reference. He said it was at home and he would locate it and provide it when the investigation meeting resumed. Mr Fannin was directed to produce the reference at the resumed investigation meeting.

[27] Following further questioning by the Authority on the first day of the investigation meeting, Mr Fannin stated that he had brought a personal grievance claim in the Authority against Mr Hyndman because Mr Hyndman had not paid him "for certain things". This matter resolved at mediation and a settlement agreement was entered into.

[28] At the Authority's resumed Investigation meeting on 2 December 2019, Mr Fannin did not provide the Authority with a copy of the reference from Mr Hyndman. Mr Hyndman gave evidence. He denied providing Mr Fannin with a reference.

[29] When asked why he had not provided the Authority with the reference from Mr Hyndman, Mr Fannin said as soon as the case with Mr Hyndman had settled at mediation, he discarded the reference along with other documents. Mr Fannin told the Authority he saw little point in keeping the reference as it was worthless to him. Mr Fannin did not provide the Authority with this explanation at the Investigation meeting on 4 November 2019, he said the reference was at home, that he would find it and provide it to the Authority. Mr Fannin was not able to satisfactorily explain the discrepancies in his responses to the Authority.

[30] Further, it is my view that Mr Fannin has acted in a manner which reflects poorly on his credibility. There were a number of instances of this behaviour. I refer to two instances, by way of example.

### **First instance**

[31] Mr Fannin accepted that he requested Mr Liddington to sign off the remaining job units of his apprenticeship requirements, in return for which he would voluntarily resign. This would enable Mr Fannin to register as an electrician without completing his apprenticeship. In my

view, Mr Fannin was asking Mr Liddington to act dishonestly. Mr Fannin was asking Mr Liddington to declare that Mr Fannin had completed his apprenticeship units, when he had not. In return, Mr Liddington would “go quietly” which when put into context meant that Mr Fannin would not take a claim against Mr Liddington or Liddington Electrical.

### **Second instance**

[32] In the period of time between the Authority’s first investigation meeting on 4 November 2019 and the resumed investigation meeting on 2 December 2019, Mr Fannin,(through his representative, who the Authority subsequently discovered is Mr Fannin’s sister, Ms Amelia Brookland) sent what I consider to be an improper communication to Mr Liddington’s counsel.

[33] Ms Brookland’s letter referred to what she considered to be a breach of privacy by Mr Liddington which she claimed amounted to “... well known defamation and terrorisation of [Mr Fannin’s] family. The letter went on to state: “As a result, on Friday 15<sup>th</sup> November I will be filing a suit in the human rights tribunal against David Paul Liddington (not Liddington Electrical). We will be asking for \$200,000 in compensatory remedies for damages. This claim and the one against Liddington Electrical will be dropped if Mr Fannin receives \$50,000 from Liddington Electrical by 15<sup>th</sup> November. Please notify your client of this offer. He has seven days to accept.”

[34] I consider this threat to be an attempt to blackmail Mr Liddington. Whether or not the threat did amount to blackmail is not a matter for the Authority to determine, it is a criminal matter. However, this is further conduct by Mr Fannin which I consider affects his credibility.

[35] Overall I found the evidence of Mr Liddington and the witnesses for Liddington Electrical to be more credible and I have preferred it to the evidence of Mr Fannin and his witnesses. Accordingly, where there is a dispute in the evidence, I prefer the evidence of the witnesses for Liddington Electrical.

### **Mr Fannin’s employment**

[36] In August 2018, Liddington Electrical was extremely busy. Mr Liddington was told by Mr Eric Beazely, Business Development Manager at Corys Electrical Limited, a supplier with whom Mr Liddington had considerable contact, that Mr Fannin was looking for work. Mr Hyndman had made contact with Mr Beazely to see if he knew of any opportunities for Mr Fannin. This was because it had become apparent to Mr Hyndman that he did not have enough work to keep Mr Fannin on.

[37] Mr Beazley, who had observed Mr Fannin's work, told Mr Liddington he thought Mr Fannin was a good worker. Mr Beazley gave Mr Liddington Mr Fannin's phone number. Mr Liddington called Mr Fannin and a meeting was set up at Mr Fannin's home on 10 August 2018 to discuss a job at Liddington Electrical.

#### **Job interview – 10 August 2018**

[38] Mr Fannin says he was anxious about his criminal record and says he and his wife, Mrs Hitomi Fannin discussed what he should do if asked by Mr Liddington at the interview if he had any criminal convictions. Mr Fannin says he felt he had "done time and paid a large sacrifice" when serving his nine months home detention. Mr Fannin took advice from Work and Income New Zealand (WINZ) and the Ministry of Business Innovation and Employment (MBIE). He says he was told that he did not need to disclose criminal convictions unless asked. Mr and Mrs Fannin agreed that they would follow this advice.

[39] The job interview was at Mr and Mrs Fannin's home. Mr Liddington says he was invited in for a cup of tea. Following some pleasantries, Mr Liddington says he and Mr Fannin sat at the dining room table to talk about possible work at Liddington Electrical. Mr Liddington says Mrs Fannin did not sit at the table, rather she sat on the other side of the lounge with her young child while they talked.

[40] Mr and Mrs Fannin both say that Mrs Fannin also sat the table with Mr Liddington during the interview. Mr Fannin says he told Mr Liddington what his hourly rate had been at his previous job. Mr Liddington informed Mr Fannin that the role at Liddington Electrical would be that of an apprentice and he would be paid \$20 an hour.

[41] Mr Liddington says he asked Mr Fannin whether or not he had any criminal convictions and that this was something he always asked prospective employees. Mr Liddington says that Liddington Electrical's customer database includes customers for whom security is a significant issue. When asked the question about criminal convictions, Mr Fannin replied "No, all sweet Bro". Mr Liddington felt the interview went very well and decided to offer Mr Fannin the role.

[42] Both Mr and Mrs Fannin say that at the interview Mr Liddington did not ask Mr Fannin if he had any criminal convictions. They both say that Mr Fannin would never use the words "All sweet Bro" at an interview, it would not have been professional to talk in such a manner.

[43] Mr Liddington says that Mr Fannin always used the word “Bro” and he was known as “Mr Bro”. Text messages between Mr Anderson and Mr Fannin were provided to the Authority in which Mr Fannin used the word “Bro” on a number of occasions and in the email exchange used the words “Sweet Bro” on two occasions. Mr Fannin produced text messages between himself and Mr Hyndman in which he used the words “Bro”.

[44] I prefer Mr Liddington’s evidence, for the reasons previously given concerning Mr Fannin’s credibility. I am also persuaded by Mr Liddington’s evidence that he has been in business for 32 years and his customer base includes government agencies for whom security is very important. It is Mr Liddington’s practice to always ask if a prospective employee has criminal convictions and to require them to complete a Ministry of Justice form concerning criminal convictions.

[45] I find that it is more likely than not that Mr Liddington did ask Mr Fannin at the interview if he had any criminal convictions and Mr Fannin told him he did not.

### **16 November 2018**

[46] Both Mr Liddington and Mr Fannin agree that on Friday, 16 November 2018, Mr Liddington gave Mr Fannin an employment agreement with a Ministry of Justice application form for criminal records history. Mr Fannin was invited to take the documents home and if he was happy with the documents, to fill them out and return them to Mr Liddington.

[47] Mr Fannin says he believed that Mr Liddington had found out about his criminal convictions and that is why he provided him with the Ministry of Justice form (and employment agreement), at that time.

[48] Mr Liddington denies this. He says that he invariably does not give a prospective employee an employment agreement before commencing employment. This is a matter he attends to once the employee has started employment. Mr Liddington says he has done it this way for over 30 years with no problems. He is now aware that this is not good practice. This is a matter that should be rectified by Mr Liddington immediately. A prospective employee is legally entitled to a copy of the intended employment agreement prior to signing the agreement

so that he or she can seek advice before entering into the agreement.<sup>1</sup> This of course is important for both parties.

[49] Mr Liddington says he asked Mr Fannin to take the documents home and read them, which he did.

### **20 November 2018**

[50] On Tuesday, 20 November 2018, Mr Liddington asked Mr Fannin whether he had read the employment agreement and other documents and his response was “Yeah, all good”.

[51] Approximately two hours later, Mr Fannin informed Mr Liddington that he was not able to fill out the Ministry of Justice form because he had a criminal conviction for minor credit card fraud. Mr Liddington’s response was that all staff have to have a police clearance because of the work they do involving government agencies such as NZ Police and Ministry of Social Development. Mr Liddington says he was shocked to hear that Mr Fannin had a criminal conviction because that is something that he was specifically asked at the interview for the position on 10 August 2018 and he had been told by Mr Fannin he did not have criminal convictions.

[52] Mr Fannin asked Mr Liddington what was to happen next and was told by Mr Liddington that he needed to think about things.

### **21 November 2018**

[53] Mr Fannin approached Mr Liddington on the morning of 21 November 2018. Mr Liddington was seated in his van at Corys Electrical, one of Liddington Electrical’s suppliers, where he meets his staff at the beginning of each day. Mr Fannin wanted to discuss what was going to happen. There was discussion about the type of work at Liddington Electrical. Mr Liddington had done a google search of Mr Fannin and felt that his criminal convictions were serious and posed a problem. Mr Liddington says Mr Fannin suggested an “amicable solution” in which he would voluntarily resign and “go quietly” if Mr Liddington signed off the remaining six units of his apprenticeship. Mr Liddington was not prepared to do this, he felt he was being blackmailed.

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<sup>1</sup> s63A(2) Employment Relations Act 2000

[54] Mr Fannin became angry and aggressive. Mr Liddington felt uncomfortable and left the van and walked in to the lunchroom at Corys Electrical. Mr Fannin followed and raised issues about his employment agreement with Mr Liddington, including that he was entitled to paid meal breaks. Mr Fannin says Mr Liddington's response to his questions over meal breaks and other issues with the employment agreement was: "Well if that is your attitude you can fuck off now."

[55] Mr Liddington disputes this. He says the conversation became heated but he did not tell Mr Fannin to fuck off. Following enquiries with staff at Corys he says no-one recalls hearing him swear in such a manner at Mr Fannin. Mr Beazley was not there at the time and did not hear the exchange. However, he told the Authority that in his four years at Corys Electrical he has never heard Mr Liddington swear or raise his voice.

[56] I prefer Mr Liddington's evidence. Mr Fannin was asked if he had criminal convictions when interviewed by Mr Liddington on 10 August 2019. Mr Fannin replied "No, all sweet bro". This was a common phrase of Mr Fannin's. Mr Liddington believed Mr Fannin had no criminal convictions. When Mr Fannin was not able to sign the Ministry of Justice application for criminal records history form because that would mean disclosing criminal convictions, he told Mr Liddington that he had "minor criminal convictions".

[57] When Mr Fannin became aware that following a google search Mr Liddington knew the full extent of Mr Fannin's offending, he attempted to negotiate a solution with Mr Liddington. In exchange for Mr Liddington signing off his uncompleted apprenticeship papers, Mr Fannin would voluntarily resign and go quietly. Mr Liddington refused.

### **Unjustifiable dismissal claim**

[58] Mr Fannin continued working for the rest of the day on 21 November 2018. Before anything further occurred, Mr Fannin sent a summary of his version of events of the 21 November 2018, to Mr Liddington. He stated that he felt that he had been unjustifiably dismissed and sought holiday pay and compensation. The letter was sent by Mr Fannin to Mr Liddington at 5:04pm on 21 November 2018. Mr Liddington responded by email at 5:50am on 22 November 2018.

[59] Mr Liddington's email states:

Hi Rafe, you have not been dismissed and are still an employee. We will put you on leave today and contact you later in the day when my advisors have got back to me. Due to a previous engagement I will not be at Cory's this morning. Regards Dave Liddington.

[60] Mr Fannin responded at 7:46am as follows:

Hi Dave I'm sure you remember our conversation in Corys kitchen yesterday when you said "If that's going to be your attitude you might as well fuck off". Any reasonable person would consider that dismissal. So I do not accept your position that I am on leave. It's my opinion that I was dismissed yesterday. Please advise when a suitable time is for me to drop off my uniform and discuss among other things my holiday accrued and reparation for wrongful dismissal. Regards Rafe.

[61] On Thursday, 22 November 2018, Ms Sian Stewart, Mr Liddington's representative, contacted Mr Fannin asking that he communicate with her directly. In response, Mr Fannin sent his summary of events, which he says amounted to his unjustifiable dismissal by Liddington Electrical. Ms Stewart responded that the employment relationship had not been terminated and therefore Mr Fannin remained an employee of Liddington Electrical.

### **26 November 2018**

[62] Mr Liddington provided his version of events on Monday, 26 November 2018 disputing Mr Fannin's version.

### **28 November 2018**

[63] On 28 November 2018, Ms Stewart wrote to Mr Fannin confirming that he remained an employee of Liddington Electrical and that once he returned to work, Mr Liddington wished to commence a disciplinary process "to address our concerns that you failed to be open and communicative regarding your convictions, and in relation to your behaviour in offering your resignation in return for your apprenticeship units being signed off". Ms Stewart ended the letter by stating that if Mr Fannin did not return to work then it would accept his resignation and his employment would cease on 30 November 2018.

### **First Issue – Was Mr Fannin dismissed?**

[64] It is my view that Mr Fannin was not dismissed. When he became aware of Mr Fannin's serious criminal convictions Mr Liddington was understandably concerned. However, he did not dismiss Mr Fannin. Rather, he informed Mr Fannin that he wanted time to think. Mr Fannin did not give Mr Liddington the opportunity to understand what had occurred with Mr Fannin

in terms of his criminal convictions, nor to explore whether or not there was a future for him at Liddington Electrical. Almost immediately upon finishing work on 21 November 2018, Mr Fannin, sent an email to Mr Liddington claiming that he had been unjustifiably dismissed. At just after 5:00 a.m. the following morning, Mr Liddington clarified in an email to Mr Fannin that he had not been dismissed, he was still an employee. Mr Fannin was informed by not only Mr Liddington but also in the following days by Mr Liddington's representative, Ms Stewart that he had not been dismissed but that Liddington Electrical would be looking into concerns it had about Mr Fannin not disclosing his criminal convictions to Mr Liddington when asked.

[65] The Court of Appeal in *Principal of Auckland College of Education v Hagg*<sup>2</sup> stated:

On an ordinary use of language “dismissal” is a unilateral act by the employer which terminates the employment contract. “To dismiss” is defined in the Oxford English Dictionary as: “To send away or remove from office, employment, position; to discharge, discard, expel.”

[66] In the current case, I have made a finding that Mr Liddington did not swear at Mr Fannin or use the words attributed to him by Mr Fannin. Mr Liddington did not use words or actions to dismiss Mr Fannin. If I am incorrect in my finding, it is my view that as soon as Mr Liddington realised Mr Fannin believed he had been dismissed he clarified with Mr Fannin that he had not been dismissed.

[67] In *New Zealand Cards Limited v Ramsay*<sup>3</sup> Judge Couch stated:

If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

[68] It was Mr Fannin who chose not to return to work despite being told that he had not been dismissed, and that he was still an employee of Liddington Electrical. Ms Stewart on behalf of Liddington Electrical informed Mr Fannin that if he did not return to work by 29 November 2018, then it would accept his resignation effective 30 November 2018. Mr Fannin did not return to work. Mr Fannin was not dismissed, he resigned.

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<sup>2</sup> [1997] ERNZ 116 at 124

<sup>3</sup> [2012] NZEmpC 51 at [51]

**Second Issue – In the event that Mr Fannin was dismissed, was it unjustifiable?**

[69] As I have made a finding that Mr Fannin was not dismissed, I do not need to consider whether he was unjustifiably dismissed. However, it is my view that if I am not correct in my finding that Mr Fannin was not dismissed, any dismissal by Liddington Electrical in my view would have been justified.

[70] Mr Liddington asked Mr Fannin, at the job interview if he had criminal convictions. Mr Fannin said that he did not. Mr Liddington was entitled to rely on that representation by Mr Fannin. Liddington Electrical had customers for whom security was a significant concern. Mr Fannin dishonestly answered Mr Liddington’s question about criminal convictions.

[71] Counsel for Liddington Electrical referred the Authority to the decision in *Joshua King v Linfox Logistics (NZ) Ltd*<sup>4</sup>. In that case Mr King’s “...criminal history, including dishonesty offences, coupled with his dishonesty on the application form caused it [Linfox] to lose the essential trust and confidence it needed to have in him”.

[72] The Authority in that case found the dismissal substantively justified but there to be procedural failings which meant the dismissal was not justified. Not only did Mr Fannin fail to disclose his criminal convictions when asked by Mr Liddington at the job interview, he also attempted to compel Mr Liddington to sign off remaining apprenticeship units in return for which he would “voluntarily resign and leave quietly”.

[73] Such conduct by Mr Fannin would have amounted, in my view, to a fundamental breach of his employment agreement with Liddington Electrical. Mr Fannin failed to be open and honest with Mr Liddington on a number of occasions. If Mr Fannin was dismissed, his dismissal would have been substantively justified, in my view.

**Third Issue - If Mr Fannin was unjustifiably dismissed, what remedies are available to him?**

[74] If I am not correct in that view, and Mr Fannin was dismissed and the dismissal did amount to an unjustified dismissal, should a remedy be awarded? Or should no remedy be awarded having regard to Mr Fannin’s conduct which Liddington Electrical says was disgraceful.

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4 [2015] NZERA Christchurch 167

[75] In *Emmerson v Northland District Health Board*<sup>5</sup> Judge Corkill stated:

[378] In *Xtreme Dining Ltd v Dewar*, a full Court expressed the view that it may not be just or equitable to award remedies under s 123 of the Act, where the employee has engaged in disgraceful conduct.<sup>42</sup> It stated:<sup>43</sup>

... when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that this statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[379] In this passage, the reference to dicta of the Court of Appeal was to that contained in *Salt v Fell*.<sup>44</sup>

[380] In that instance, the majority stated:<sup>45</sup>

... the result should be that the employee does not benefit from his or her wrong. At times the subsequently discovered conduct may be so egregious that no remedy at all should be given, notwithstanding the dismissal being technically unjustifiable. But that will not often be the outcome. After all, the employer has committed a wrong, namely an unjustified dismissal based on what he or she knew at the time. He or she did not act as a fair and reasonable employer would have acted in all the circumstances at the time.

[381] In short, the question is whether there is sufficiently egregious misconduct, either known or unknown to the employer, which should lead to a conclusion that it would be contrary to equity and good conscience to award any remedies for the dismissal grievance.

[76] If I am wrong in my conclusion that Mr Fannin was not unjustifiably dismissed, Mr Fannin’s conduct was egregious and it would be contrary to equity and good conscience to award any remedies for any dismissal grievance he may be found to have established.

[77] Mr Fannin claims that he was unjustifiably dismissed and his hurt and humiliation was severely aggravated by Mr Marcus Damerell, a friend of Mr Liddington’s who distributed

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<sup>5</sup> [2019] NZEmp64 at para[378]

<sup>42</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.

<sup>43</sup> At [216].

<sup>44</sup> *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155, at [96].

<sup>45</sup> At [96]. The case was decided under the previous test of justification under s 103A of the Act, where the focus was on what a fair and reasonable employer ‘would’ have done rather than what a fair and reasonable employer ‘could’ have done, which is the present position

posters in his neighbourhood warning people about Mr Fannin and his criminal past. I am satisfied that Mr Liddington was not aware of this action.

[78] This was a matter that Mr Fannin reported to the Police for investigation and which was resolved. Given the Authority's finding that Mr Fannin was not unjustifiably dismissed and if he was, no remedies would be awarded, this matter is not a matter for investigation by the Authority.

### **Costs**

[79] Costs are reserved. Liddington Electrical has fourteen days from the date of this determination in which to file and serve a memorandum as to costs. Mr Fannin has fourteen days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**