New Zealand Employment Relations Authority Decisions

Hemopo v Carenz (Est 1954) Limited [2011] NZERA 157; [2011] NZERA Christchurch 43 (23 March 2011)

New Zealand Employment Relations Authority

Hemopo v Carenz (Est 1954) Limited [2011] NZERA 157 (23 March 2011); [2011] NZERA Christchurch 43

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 43

5315302

BETWEEN

AND

PHILLIP ALLAN HEMOPO Applicant

CARENZ (EST 1954)
LIMITED
Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Determination:

M B Loftus

Michael Guest, Advocate, and David Brett, Counsel for the Applicant
Kerry Smith, Counsel for the Respondent 10 March 2011 at Dunedin At the investigation meeting

23 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Phillip Hemopo, claims he was unjustifiably dismissed from the respondent's employ on 31 March 2010.

[2] The respondent, CareNZ Limited, accepts that it dismissed Mr Hemopo but contends that its actions were justified.

Background

[3] CareNZ, a wholly owned subsidiary of the New Zealand Society on Alcohol and Drug Dependence, operates seven Drug Treatment Units (DTU) which provide programmes for prison inmates pursuant to a contract with the Department of Corrections (Corrections).

[4] One of those Units is located within the Otago Correctional Facility at Milton. The Milton Unit was, at the beginning of 2010, relatively new. It was expanding and additional staff were being sought.

[5] Mr Hemopo, a qualified Teacher with postgraduate qualifications in drug and alcohol counselling, responded to CareNZ's advertisement for counsellors on 10 February 2010. He was subsequently interviewed and considered the best candidate.

[6] CareNZ offered the position to Mr Hemopo on 2 March 2010. The letter and attached employment agreement canvassed the issues one would normally expect in such correspondence. Included therein, and subsequently to become central to this dispute, was a requirement that Mr Hemopo obtain a *favourable clearance of your Ministry of Justice security form and the ability to maintain this clearance for the duration of your employment with CareNZ in the DTU.*

[7] Mr Hemopo was required to indicate his acceptance or otherwise by 10 March 2010. Whilst it is unclear whether or not formal acceptance occurred by that date, it is agreed that he advised CareNZ he wanted the job. Discussions continued over two matters, of which one was the applicable salary, but Mr Hemopo acted as if he was going to accept CareNZ's offer by resigning from his previous employment.

[8] It is also agreed that during the period leading up to Mr Hemopo's commencement with CareNZ he and the respondent's Milton Manager, Mr Kevin Pearce, met twice. There is some debate as to where those meetings occurred, with Mr Hemopo saying both were in Dunedin and Mr Pearce saying one was in Dunedin and the other was at the Prison. Notwithstanding that disagreement, which is irrelevant to the matters to be determined, it is clear that the parties resolved their contractual differences and it was agreed that Mr Hemopo would commence with CareNZ on 29 March 2010. Agreement was reached before the events of 17 March (see below) but Mr Hemopo did not sign an employment agreement at this time.

[9] In the interim, however, an unfortunate event occurred. 17 March 2010 was the first anniversary of the accidental death of Mr Hemopo's brother-in-law. Mr Hemopo states that the anniversary affected him badly. He says that he was not performing normally. Indeed the evidence of both Mr Hemopo and an ex-colleague who saw him at his workplace that morning would suggest his behaviour might possibly be considered irrational.

[10] During the morning Mr Hemopo left his place of work intending to go to his brother's grave. On the way he stopped at a local hardware shop. He goes on to say:

I was walking through the store almost in a daze and feeling so much pain and grief. This is when I decided to steal the garden hoe.

[11] Mr Hemopo freely admits the theft, though whether or not that was an accurate description of what he did became a point of disagreement during the investigation meeting. Mr Hemopo took the bar code from a hoe valued at $29.96 and placed it on another hoe valued at $59.24. He then proceeded to the checkout and paid the lesser amount, thus depriving the shop owner of $29.28.

[12] Later that day, and after Mr Hemopo had visited the cemetery, he was approached at home by a Police Officer. The Officer put the factual accusations to Mr Hemopo and these were readily admitted. Mr Hemopo was charged with obtaining by deception and it appears that the Police Officer raised, at that early stage, the possibility that he may be eligible for diversion. Diversion may, in simplistic terms, be described as a system under which a person who has committed a minor offence (normally their first) avoids conviction in exchange for admitting their guilt and taking appropriate actions in respect to reparations etc.

[13] Soon thereafter Mr Hemopo approached his solicitor, Mr Brett, seeking assistance with the criminal charges. The possibility of diversion was again discussed, with Mr Brett advising Mr Hemopo not to talk of the incident as, should he ultimately obtain diversion, *no one need ever know.* Mr Hemopo chose to adhere to this advice and therefore took no action to advise his prospective employer, Care NZ, of his new predicament.

[14] Mr Hemopo reported for work with CareNZ on 29 March 2010 as arranged. The day was taken up with an induction programme and initial meetings with some of the prisoners with whom Mr Hemopo would work.

[15] The following day he was approached by Mr Pearce and asked to sign his individual employment agreement. Mr Hemopo states that he responded by saying *Kevin I need to talk to you, I need to tell you something,* or words to that effect. The two then went to Mr Pearce's office where Mr Hemopo advised him of the pending charge. In his Statement of Problem Mr Hemopo states that he advised Mr Pearce he had been charged with obtaining by deception, but in answers to questions during the investigation meeting he stated that he told Mr Pearce that he had stolen a hoe. Mr Pearce is of the view that he was told Mr Hemopo had been charged with theft. The relevance of this difference is explained in 27(b) below. Irrespective of that difference, the two are in agreement that Mr Pearce responded with surprise, said that he had no experience of this type of situation and that he needed to get advice from Human Resources, or words to that effect.

[16] A short time thereafter and having spoken to Human Resources in CareNZ's head office, Mr Pearce again approached Mr Hemopo, though the two again disagree about what was said. Mr Hemopo claims that Mr Pearce advised:

its okay, sign the contract but be aware that we will have to add something which says that if you do this again you will be fired (or words to that effect).

[17] Mr Pearce denies giving the above advice. He is of the view that he told Mr Hemopo he had been told by Human Resources to obtain Mr Hemopo's signature on the contract, and that while he hoped things would work out okay, Debbie (the HR Manager) was seeking advice about how to respond from senior managers. He also states that he had some concerns about being told to get Mr Hemopo's signature on the agreement and thought it better to await the response of senior managers. Notwithstanding those concerns, he chose to keep silent and obtain the signature as instructed.

[18] Mr Hemopo signed his individual employment agreement and nothing further was said about the matter that day.

[19] Mr Hemopo states that the following day, 31 March 2010, he was called to Mr Pearce's office, advised that he was to be dismissed and handed a letter. The letter, signed by Mr Pearce, read:

Dear Phillip

It is with regret that I need to inform you we are unable to continue your employment here at the CareNZ Drug Treatment Unit. Please refer to our letter of offer in which we referred, not only to your ability to be cleared to work in the Prison, but also to be able to maintain this clearance throughout your employment with us. The disclosure regarding your arrest and pending Court hearing will affect your ability to maintain this clearance, and will therefore require you to immediately exit the Unit. I will need to advise the

Prison Manager of this disclosure. I have discussed this matter with staff at CareNZ's head office, and it is CareNZ's considered decision that we terminate your contract immediately.

[20] Whilst there is some minor divergence over exactly what was said, Mr Pearce concurs with the thrust of Mr Hemopo's evidence. He says that it was *pretty cut and dried.* He had been instructed to dismiss Mr Hemopo, collect his keys and identity card and escort him from the property. He did so. He says the decision to dismiss was made by Mr Timothy Harding, CareNZ's Chief Executive Officer.

[21] Mr Harding accepts that the decision to dismiss Mr Hemopo was his, but adds that he only reached it after consulting with Ms Dionne Willcocks, CareNZ's General Manager, and Ms Debbie Yates, the Human Resources Manager.

[22] Mr Harding accepts that none of the three had any discussions with Mr Hemopo before the decision was reached. He says:

... there was no need for an investigation because Mr Hemopo had disclosed his offending to Mr Pearce. We discussed the damaging position into which CareNZ would be put with the Department of Corrections and the complete undermining of the programme's integrity that would occur when the charges became known, which we felt was inevitable.

[23] There then followed some increasingly terse correspondence which failed to resolve the dispute between the parties, thus leading to the present investigation meeting. Of note therein are two letters. The first, written by Ms Yates on 23 April 2010 contains advise that

... it has been decided that we can in no way reverse or reconsider your employment at the Otago Corrections Facility.

Our decision is based on the way in which you managed the stress and trauma that you obviously still carry in relation to your brother-in-law's death. While we acknowledge the trauma that such an event can have, our concern is that any trigger in this regard may at a future time trigger similar behaviour, and this would threaten the integrity of the Therapeutic Programme.

[24] The second was a response to Mr Hemopo's advice that he considered he had a personal grievance. It was written to Mr Brett on 31 May 2010 by Mr Rod Lingard, a consultant acting on CareNZ's behalf, and contains a comment that

It is also apparent from Mr Pearce's letter dated 30 March that he [Mr Pearce] *may have incorrectly informed Mr Hemopo that he was being dismissed because of a perceived inability to obtain / maintain proper clearance to work in a public prison. To be clear, our instructions are to clarify that your client was summarily dismissed for serious misconduct in that he admitted an offence that compromised his suitability for employment.*

[25] Lastly it should be noted that, as the constabulary had indicated he might, Mr Hemopo ultimately received diversion. That occurred on 30 April 2010.

The parties' positions

[26] A brief precise of the arguments proffered on Mr Hemopo's behalf is:

> (a) The letter of 30 March advises that Mr Hemopo was required to obtain, and be capable of maintaining, a Ministry of Justice clearance. That was the contractual requirement and the fact that he subsequently received a sentence of diversion meant that he always remained capable of meeting the contractual condition. There is, therefore, no substantive foundation upon which the dismissal can be based;
> (b) There is an inconsistency between the reason for dismissal expressed in the letter of 30 March and those subsequently enunciated. However rather than suggest that this evidenced a gross procedural failure, given the real reasons for dismissal were never put to Mr Hemopo, this was to used to emphasis the fact that the reason expressed in the letter of 30 March was contractually invalid (see 26(a) above);
> (c) That in a letter dated 31 May 2010 CareNZ's then representative, Mr Rod Lingard, stated:

Unfortunately, Mr Pearce received incorrect advice regarding Mr Hemopo's disclosure and should not have proceeded with the employment offer under such circumstances.

It is contended that the reference to *incorrect advice* supports Mr Hemopo's contention that he was advised that all was 'ok' etcetera (refer 16 above). It is argued that that being the case, CareNZ is estopped from enforcing its subsequent decision to dismiss;

> (d) That, at least initially, there was a suggestion of disparate treatment given that CareNZ employs a number of people with serious convictions though this argument was not pursued with any vigour given answers provided by CareNZ's witnesses. Mr Guest's decision not to pursue this was, in my view, a correct one; and (e) The dismissal was so procedurally flawed that no reasonable employer could possibly have reached that decision.

[27] Mr Smith, on behalf of CareNZ, proffered extremely detailed and complete submissions. The following can only, therefore, be considered a brief and superficial precis of CareNZ's position. It is their view that notwithstanding the failure of the decision maker to speak to Mr Hemopo before deciding to dismiss, the outcome was preordained and would not have altered. This is due to the following reasons:

> (a) Mr Hemopo advised Mr Pearce of serious wrongdoing, albeit a different offence from that with which he was charged. His wrongdoing was such that dismissal was justified notwithstanding the procedural failures and reference was made to cases such as *Chief Executive of Unitec Institute of Technology v K J Henderson* [2007] 8 NZELC 98,793 and the comments of William Young J in *Waitakere City Council v Ioane* [2004] NZCA 218; [2004] 2 ERNZ 194, 200;
> (b) His offending would have placed CareNZ and its programme at severe risk by undermining its integrity. This is a reference to the fact that the programme models transformational change. The modelling occurs through using

people with a past history of offending evidencing successful rehabilitation by exhibiting a prolonged and on-going commitment to change. CareNZ claim that should someone demonstrate both dishonesty and a lack of transparency, they are unsuitable counsellors and mentors. They argue that Mr Hemopo fails on both counts given his portrayal of his actions as theft, as opposed to obtaining by deception, which suggest he is displaying a lack of transparency by trying to hide the real nature of the offending and contend that he was deliberately dishonest in that his actions were not a spur of the moment theft as he now portrays them, but a considered and rational course of action carried out over a period of time.
(c) Similarly CareNZ contend that recent offending, as this was, precludes people from being effective counsellors. CareNZ is of the view that a considerable period of time must pass since a last offence so that counsellors can evidence the ongoing commitment to change necessary for successful rehabilitation;

(d) CareNZ are adamant that Mr Hemopo's offending would have meant the Corrections would not have allowed him continued access to the Prison, thus frustrating the employment agreement; and
(e) Finally, there are now serious reservations about Mr Hemopo's integrity. This is a reference to two issues. The first is Mr Hemopo's failure to advise it forthwith of the situation in which he found himself (portrayed as a breach of the duty of good faith) and the second is an additional reference to the issue of whether or not Mr Hemopo's actions were theft or obtaining by deception and the connotations that flow from that debate - see (b) above.

Determination

[28] The fact the respondent accepts it dismissed Mr Hemopo means it also accepts the onus of justifying the dismissal.

[29] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the

question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal . occurred.

[30] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the Employment Court observed that the Authority is required to objectively review the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[31] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear that issues of substance and process overlap and that there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially given soon to be implemented changes to the Act.

[32] As of 1 April 2011 s.103A of the Act will be amended and include a provision reading:

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[33] Subsection (2) contains a provision which is similar to the present section 103A (29 above), though the word *would* will soon be replaced with *could.*

[34] While the new provision is yet to become law, I refer to it as its content, or at least subsections (b) to (d) inclusive, succinctly codifies that which case law has, for many years, considered the basic requirements of a fair process.

[35] The simple fact is that CareNZ fails dismally. I reach this conclusion as:

(a) CareNZ never put its real concerns to Mr Hemopo, namely those about the offending compromising his ability to model transformational change and be an effective counsellor.
(b) They never put their fear that the recent nature of his offending would have mean that Corrections would preclude access to the Prison, thus frustrating the employment agreement (and, in fact, never asked Corrections);
(c) Mr Hemopo was never given an opportunity to explain - he was simply advised that a decision to dismiss had been made; and
(d) It must therefore follow that the explanation, given no opportunity to proffer one, was not genuinely considered.

[36] These are simply not the actions of a fair and reasonable employer, and no employer is capable of basing a decision to dismiss on such a deficient investigation. Indeed, and as events transpired, the lack of inquiry was such that at the point of dismissal, CareNZ did not even know the exact nature of the offending which, in my view, makes it very hard to conclude he had committed serious misconduct or that his actions had irreparably impaired his ability to work for them.

[37] The dismissal is, for the reasons expressed above, found to be unjustified.

[38] The conclusion that the dismissal is unjustified leads to a consideration of remedies. Here some difficulty arises. It does so for two reasons.

[39] First, I do not accept the argument that CareNZ was estopped from dismissing Mr Hemopo. This is because I prefer Mr Pearce's version of the exchange on 30 March and his view that he did not tell Mr Hemopo all would be *"ok"* (see 16 and 17 above). I do so as he impressed as a sound witness - he did not contradict himself and openly admitted to a past that was far from ideal, especially given his answers were provided when the issue of disparity remained alive. On the other hand, Mr Hemopo vacillated about the nature of his offending while, at times and when under questioning, was unable to grasp the import of what was being said. He exhibited a predilection to interpret comments and questions in a way which accorded with the outcome he sought. I could easily envisage the same having happened on 30 March.

[40] Second, and this is the real issue, I am cognizant of the words of William Young J in *Waitakere City Council v Ioane* which Mr Smith referred me to. He said

[22] I agree with the judgment prepared by Anderson P but wish to add comments about the approach which should be adopted for the assessment of compensation in cases where a dismissal is held to have been unjustifiable on procedural grounds

[24] If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's "unfair"process was not causative of any significant loss of remuneration.

[41] CareNZ rely upon four points in support of their contention that the dismissal was justified (see 27(a) to (d) inclusive). I disregard the argument tendered under 27(a), given CareNZ's failure to identify the true nature of Mr Hemopo's offending, but the other three raise questions about whether or not dismissal would have been inevitable given a complete and proper investigation.

[42] CareNZ argue that Mr Hemopo's actions of 17 March were such that they would both undermine the programmes integrity and bring his suitability into question to such an extent that his continued employment was fatally compromised (see 27 (b) and (c) above). That evidence went almost totally unchallenged and is accepted.

[43] There was also the issue of whether or not Corrections would have allowed Mr Hemopo to work on the premises given his offending (27(d) above). The evidence came in two parts - Mr Pearce's statement that the prison manager had subsequently observed CareNZ did the right thing in dismissing Mr Hemopo and Mr Harding's evidence about Corrections' attitude. Mr Harding's evidence also came in two parts -one cited the difficulties the CareNZ had in getting clearances for staff with historic convictions and the other related to the way in which Corrections reacted when wrongs were committed by extant staff. Mr Pearce's evidence was challenged as hearsay, but Mr Harding's went largely unchallenged. He suggested it was highly probable that Corrections would have withdrawn Mr Hemopo's access rights, thus putting him in a position whereby he was frustrated from performing his obligations under the employment agreement though an absolute conclusion is precluded by the fact that CareNZ failed to put the relevant question to Corrections.

[44] When I consider the evidence canvassed above, I have no doubts that had CareNZ conducted a proper and complete investigation, dismissal would have resulted. Applying the principles enunciated by William Young J, I have to conclude that Mr Hemopo's wage loss is limited to the period that would have been needed for completion of a full and proper investigation. I consider the period of a week appropriate and will order lost remuneration accordingly.

[45] Here, and as an aside, I note that had the wage loss not been limited by the considerations canvassed above, there would have been issues about mitigation as the evidence leaves me with doubts about Mr Hemopo's efforts in that respect.

[46] That leaves the issue of compensation under section 123(1)(c)(i) of the Act. Mr Hemopo claims $20,000 and backed that claim with evidential support. I have no doubt that the dismissal caused harm. I also have no doubt that the fact Mr Hemopo was precluded from answering the accusations against him (or at least those relating to his continued employment) aggravated the hurt he felt. The hurt was enhanced by the fact that CareNZ only became aware of the issue as a result of his admission, though this must be balanced against the employers argument that they should have been told on or soon after 17 March. Then there is the evidence Mr Hemopo proffered about the hurt he felt as a result of rumours about the way he was approached by the Police but this I discount as public rumours about a Police response to his own offending is not something to visit upon CareNZ.

[47] Having considered the evidence, I consider an award of $5,000 to be appropriate.

[48] Finally, I am required to address the issue of contribution (s.124 of the Act). Clearly, Mr Hemopo did not contribute to CareNZ's procedural failures. He did, however, commit a crime, but one that the proper Authorities considered minor and that is reflected in the grant of diversion. Given that in this jurisdiction most successful applicants gain the bulk of their fiscal reward through the recognition of lost remuneration, and given that Mr Hemopo's attainment of an award under that head has been curtailed as a result of arguments predicated on the fact of his offending (see 42 and 44 above), I consider the issue of contribution to have been well and truly addressed.

Orders

[49] For the reasons given the following orders are made:

> (i) The respondent, CareNZ Limited, is to pay to the applicant, Mr Phillip Hemopo, one weeks' wages being the loss incurred for the period it would have taken for a full and proper investigation and after which the employment would have ended. The evidence would suggest a payment of $1,057.69 (one thousand and fifty seven dollars, sixty nine cents); and
> (ii) CareNZ is to pay to Mr Hemopo a further $5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[50] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mr Hemopo wishes to seek costs, he is required to file his application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

M B Loftus

Member of the Employment Relations Authority

NZLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback
URL: *http://www.nzlii.org/nz/cases/NZERA/2011/157.html*