

**Attention is drawn prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 123
5598020

BETWEEN PCA
 Applicant

A N D DAVID ORSBOURN MEDICAL
 SERVICES LIMITED T/A
 ENHANCESKIN
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anjela Sharma, Counsel for Applicant
 Luke Acland, Counsel for Respondent

Investigation Meeting: 19 April 2016 at Nelson

Submissions Received: 19 and 20 April 2017 for Applicant
 19 and 20 April 2017 for Respondent

Date of Determination: 12 July 2017

DETERMINATION OF THE AUTHORITY

- A. David Orsbourn Medical Services Limited unjustifiably dismissed PCA.**
- B. By way of remedies, David Orsbourn Medical Services Limited must pay PCA the following amounts, which includes a reduction of 25% for contribution:**
- a. \$6,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**

b. \$1,684.80 (gross) for lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

C. I will not impose a penalty against David Orsbourn Medical Services Limited for the alleged breach of the duty of good faith.

D. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] The applicant, PCA, accepted an offer of employment with the Respondent, David Orsbourn Medical Services Limited t/a Enhanceskin (Enhanceskin). However, PCA never commenced work with Enhanceskin as Enhanceskin withdrew the offer of employment after she had accepted it but before she started work. PCA says the withdrawal of the offer was a dismissal as she was a person intending to work under the Employment Relations Act 2000 (the Act) and, as there was no fair processes carried out nor a substantive basis for the decision to dismiss, the dismissal was unjustified.

[2] Enhanceskin says:

- (a) PCA misled it during the application process and it relied on those misrepresentations in deciding to make an offer of employment to PCA.
- (b) It relied on its agent, Intepeople, an HR recruitment agency, which carried out the process of withdrawing the offer of employment.
- (c) PCA accepted that the offer was withdrawn and is estopped from now claiming the withdrawal of the offer was actually an unjustified dismissal.

Preliminary matter

[3] In a written submission made after the conclusion of my investigation meeting, counsel for PCA requested that I not outline specific factual findings that I am required to make in order to determine this matter. Those factual findings relate to

PCA's previous employment history and in particular allegations of theft arising during that employment.

[4] Counsel for PCA says these facts relate to historical matters that are resolved. In essence, PCA has dealt with the allegations of theft arising in her previous work and has been cleared of any theft as charges in the District Court were dismissed. Counsel says in these circumstances reciting the facts that relate to the theft would cause the issues to resurface and this would be prejudicial to PCA.

[5] These facts are important to my determination because they explain the misrepresentation that Enhanceskin says PCA made. It is not appropriate that I omit my findings on them. Further, I am required to do so under s 174E of the Act.

[6] However, I am concerned that my discussion of these historic matters could cause prejudice to PCE. And, I am particularly concerned about a matter raised in evidence by PCE about the impact that publicity about this matter could have on her daughter.

[7] I am satisfied that an order for non-publication pursuant to clause 10 of schedule 2 of the Act is appropriate.¹

[8] The terms of the order are:

- (a) I prohibit from publication the applicant's name and any matters that may identify her;
- (b) This non-publication extends to details of the applicant's current and past employment but does not include details of the respondent or its agent – as the applicant did not commence work with the respondent, these details are not likely to cause her identity to become known.

Facts

[9] In August 2015, PCA was working at WSE as an administrator. On 14 August, she applied for an administrator position at Enhanceskin. The position was advertised on the website of Intepeople.

¹ Applying the test in *Erceg v Erceg* [2016] NZSC 135.

[10] On 20 August 2015, PCA had an interview with Ms Emily Bissett, a consultant at Intepeople. PCA then completed an online test on 23 August.

[11] On 24 August 2015, Intepeople told PCA that she had been shortlisted for the role at Enhanceskin. Then on 28 August PCA attended an interview at Enhanceskin with Dr David Orsbourn and Mrs Robyn Orsbourn.

[12] On 31 August 2015, PCA was told that she was Enhanceskin's preferred candidate. Intepeople asked PCA to complete an online Police vetting check and PCA completed the Police check on 1 September.

[13] On 1 September 2015, PCA collected the offer of employment from Enhanceskin and she received a draft employment agreement on 2 September. PCA then resigned from her role at WSE on 2 September.

[14] PCA went to Enhanceskin on 3 September 2015 and then again on 4 September to sign the employment agreement. The employment agreement was signed on 4 September and PCA agreed to commence work on 21 September.

[15] After PCA had attended at Enhanceskin, Enhanceskin's receptionist, told Dr Orsbourn that she recognised PCA and she believed there was an issue with PCA's employment some time ago when PCA worked at KWR. The receptionist thought there had been an issue with cash having gone missing and criminal charges.

[16] Dr Orsbourn then spoke to the owner of KWR. The owner advised him that she was aware of an issue with a staff member and allegations of theft but she did not own KWR at the time of the issues.

[17] Dr Orsbourn then spoke to the owner of KWR at the relevant time. The owner was reluctant to discuss PCA's employment with KWR with Dr Orsbourn. He simply confirmed that PCA had been employed for a short period and something had gone on with her employment.

[18] Dr Orsbourn checked PCA's CV and found that the period of employment with KWR had not been included in PCA's employment history.

[19] Dr Orsbourn concluded that what the receptionist had told him about PCA's employment was true. He was particularly concerned that PCA had effectively lied to

him about her employment history and misled him over her suitability for the role at Enhanceskin, particularly as the role was sole charge and involved handling cash.

[20] Dr Orsbourn contacted Paul Bell of Intepeople and told him what he had discovered. Dr Orsbourn says that in response Mr Bell advised him that he could not employ PCA as that would not be fair on either of them, but Dr Orsbourn should not worry as he would take care of it. Dr Orsbourn was prepared to meet with PCA to discuss what he had discovered but he was persuaded by Mr Bell to let him deal with the situation.

[21] On 11 September 2015, Ms Bissett, of Intepeople, contacted PCA and told her that Enhanceskin had changed its mind as it was now looking to employ a registered nurse who could cover the reception duties and Mrs Orsbourn would cover the reception role whilst it looked for the right person.

[22] On 16 September 2015, PCA met with Ms Bissett and Mr Bell. Mr Bell told PCA that the reason the offer had been withdrawn by Enhanceskin was because Dr Orsbourn had become aware of claims of theft in PCA's previous employment. PCA tried to explain that she did not have a conviction for theft and she could explain where the confusion may have arisen, that being a charge of theft some years earlier, which she had successfully defended, but Mr Bell did not appear to believe her.

[23] On 18 September 2015, having accepted that Enhanceskin was not going to change its mind, PCA emailed Ms Bissett and said she did not see any point in meeting with Dr Orsbourn and Mrs Orsbourn and she asked for a letter explaining why Enhanceskin was withdrawing the offer. Enhanceskin then sent PCA a letter, on 18 September, confirming that the offer of employment had been withdrawn.

The issues

[24] The issues that arise are:

- (a) Was PCA an employee notwithstanding that she had not commenced work for Enhanceskin;
- (b) If PCA was an employee, was she dismissed, which includes considering whether any applicable employment agreement could be cancelled under the Contractual Remedies Act 1979;

- (c) If PCA was dismissed, was the dismissal justified, which includes considering the procedure by which the dismissal was effected, the substantive reason for the dismissal and whether PCA is estopped from claiming the dismissal was unjustified;
- (d) If the dismissal was unjustified, what remedies, if any, is PCA entitled to; and
- (e) If PCA is entitled to remedies, did she contribute to her grievance in such a way that the remedies should be reduced?

Discussion

Was PCA an employee?

[25] Section 6(1) of the Act provides:

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes –
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who –
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer; and
 - (d) ...

[26] I am satisfied that based upon s 6 of the Act PCA was an employee. Enhanceskin had made an offer of employment, which PCA accepted by signing an employment agreement. The fact that she had not commenced employment does not change this; PCA was a person intending to work and therefore an employee.²

Did Enhanceskin dismiss PCA?

[27] As there was a concluded offer and acceptance, it was not open to Enhanceskin to withdraw the offer.

[28] It may have been possible for Enhanceskin to cancel the employment agreement based upon misrepresentation, in reliance on s 7 of the Contractual

² *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424 (WEC66/97).

Remedies Act 1979. But, as counsel for Enhanceskin rightly concedes, Enhanceskin did not do this. I cannot subsequently allow Enhanceskin to assert that the failure by PCA to disclose information about her employment history to it was a material representation, which induced it to enter into the employment agreement, such that it then cancelled the agreement when it learnt the truth, in reliance on the Contractual Remedies Act.

[29] There are a number of issues with allowing Enhanceskin to rely on this argument, but fundamentally, Enhanceskin was required to give notice of its intention to rely on the misrepresentation to cancel the employment agreement to PCA.³ And it did not do this.

[30] So, Enhanceskin could not withdraw the offer, nor can it now rely on the Contractual Remedies Act to assert the contract was cancelled. In these circumstances, the purported withdrawal of the offer of employment constitutes a dismissal.

Was the dismissal of PCA justified?

[31] In order for the dismissal to be justified, Enhanceskin must meet the requirements of s 103A of the Act. The test is whether what Enhanceskin did and how it did it, were what a fair and reasonable employer could have done in all of the circumstances.⁴ This is assessed against the statutory requirements set out in s 103A(3) of the Act and the requirements of the duty of good faith, particularly as set out in s 4(1A) of the Act.

[32] In summary Enhanceskin must show that it followed a fair procedure in coming to its decision to dismiss, including providing information to PCA, giving her an opportunity to respond to that information and considering any response before deciding to dismiss. Enhanceskin must also show that the decision to dismiss was substantively justified i.e. it is a decision that fair and reasonable employer could have come to in all of the circumstances.

[33] Clearly, Enhanceskin failed to meet the procedural aspects of a fair dismissal. And I am satisfied that the decision to dismiss was not substantively justified.

³ *King v Strait Shipping Ltd*, unreported, WEC 5/96.

⁴ Section 103A(2) of the Employment Relations Act 2000.

[34] On justification, there is a conflict in this case between the principle in *Bell v Lever Bros Ltd*⁵, that a prospective employee is under no duty to disclose information about past events that might influence the employer in its decision to employ or not, and the principle that an employee should not misrepresent his/her work history.⁶

[35] To put some perspective around this analysis it is appropriate to consider what actually occurred during PCA's employment at the pre-school.

- (a) During December 2008 and November 2009, PCA worked at KWR.
- (b) PCA was not dismissed from her employment with KWR but rather she resigned during a process relating to allegations of theft by her during her employment.
- (c) The process conducted by KWR was not completed and no decision on termination was required.
- (d) In May 2010, the police charged PCA with theft in connection with her employment at KWR. Those charges were dismissed by the District Court in June 2012 as there was insufficient evidence to establish a prima facie case.

[36] PCA accepts that she left details of her employment with KWR out of her employment experience in her CV. She says she could not see any point in listing it and only included relevant employment experience. It seems to me that it is more likely that she chose to exclude it because she thought it might be unfairly prejudicial to her employment prospects if a prospective employer became aware of the circumstances pertaining to the end of her employment at KWR.

[37] This was arguably just a decision not to disclose information that might have influenced an employer's decision to employ; information PCA believed could lead to an unfair and unwarranted influence.

[38] Without any further discussion about the missing employment period in PCA's CV in the interview or during the recruitment process, it seems arguable at

⁵ [1932] AC 161.

⁶ *NZ Amalgamated Engineering etc IUW v Vehicle Assemblers of New Zealand Ltd* [1990] 3 NZILR 792.

least that a fair and reasonable employer would not have concluded that PCA had misrepresented her employment history.

[39] And, even if the failure to disclose her employment with KWR was a misrepresentation, I cannot say that when presented with PCA's explanation a fair and reasonable employer could still have dismissed.

[40] In short, because Enhanceskin did not carry out a fair process and understand properly: (i) what happened during the period of employment that was not disclosed by PCA; (ii) why she chose not to disclose it; and (iii) what she had to say about Dr Orsbourn's conclusions that she had lied and misled him and could not be trusted in a sole charge role, it cannot conclude that the dismissal was substantively justified.

[41] Therefore, the decision to dismiss was not substantially justifiable.

[42] The additional argument put forward by counsel for Enhanceskin is that PCA is estopped from claiming unjustified dismissal because she accepted that Enhanceskin had withdrawn the offer of employment; she refused to meet Enhanceskin and simply requested confirmation of the withdrawal of the offer in writing, which Enhanceskin provided.

[43] In *Harris v TNZ Pulp and Paper Maintenance Limited*⁷ Chief Judge Colgan outlined the requirements of estoppel:

[75] The equitable doctrine of estoppel applies where it would be unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to omit to act, in a manner which is now compromised. Estoppel can operate as a sword (cause of action) as well as a shield (a defence to a cause of action). An estoppel may provide a remedy to prevent unconscionable conduct by another party including the enforcement of that other party's representations made to the claimant.

[76] There are four essential constituents of an estoppel:

- a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
- the party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppels;

⁷ [2015] NZEmpC 43

- detriment will be suffered if the belief or expectation is departed from; and
- it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[44] Counsel says PCA accepted Intepeople's suggestion that the offer of employment would be withdrawn, she did not take issue with the withdrawal and simply sought confirmation in writing. By doing this PCA created the belief or expectation for Enhanceskin that withdrawing the offer was acceptable.

[45] Counsel says, Enhanceskin then relied on this. PCA did not meet with Enhanceskin, and she did not take issue with the withdrawal of the offer until six weeks later by which time Enhanceskin had relied on her acceptance to advertise the position.

[46] It follows then that Enhanceskin says it suffers a detriment if PCA can now say she was in fact unjustifiably dismissed and it is unconscionable to allow PCA to depart from her acceptance of the withdrawal of the offer.

[47] I am not satisfied that estoppel has been made out by Enhanceskin:

- (a) First, the withdrawal of the offer of employment was not presented as a suggestion but rather a decision that had already been made. The initial advice was not a negotiation over how the parties might resolve the problem of the undisclosed employment history rather Intepeople presented it as a withdrawal of the offer based on a change in requirements by Enhanceskin. It was, as I have already concluded, a dismissal because of a unilateral decision by Enhanceskin, albeit through its agent Intepeople.
- (b) Second, PCA did take issue with the withdrawal of the offer, seeking in particular to explain her position in the meeting with Mr Bell.
- (c) Third, the request for confirmation in writing was not because PCA agreed to or even accepted the withdrawal of the offer of employment but rather she was resigned to the fact she would not change the position, that Enhanceskin had decided to dismiss her, and she wanted confirmation that that was what it was doing.

- (d) Four, any delay in raising a claim in respect of the dismissal is immaterial in the circumstances.

[48] I do accept that PCA could have taken up the offer to meet with Enhanceskin but this does not create a basis for estoppel.

Remedies

[49] As PCA has been successful with her grievance I must consider what remedies, if any, she is entitled to.

Compensation

[50] First, I can award compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act.

[51] PCA's evidence was that the dismissal had a significant detrimental impact on her, including:

- (a) Shock and distress at the withdrawal of the offer of employment and feeling physically ill;
- (b) Feeling overwhelmed by what occurred and consumed by upset;
- (c) Feeling as though she had been "judged and hung out to dry";
- (d) Humiliated at having to go back to WSE to ask for her job back, having only resigned a few days earlier;
- (e) A loss in confidence and struggling with a sense of self-worth.

[52] The source of these feelings were described as a mixture of the dismissal, the process by which it was effected including the fact that PCA did not have the opportunity to defend or explain herself, the fact that historic allegations had resurfaced, and the subsequent behaviour of Dr Orsbourn in defending the claim.

[53] I assess the level of compensation to be in the region of \$10,000.00. However, I have to allow for the fact that some of the suffering arises not from just the actions constituting the grievance but other actions for which I cannot award compensation.

On this basis I assess the level of compensation, subject to any reduction for contribution, to be \$8,000.00.

Remuneration

[54] Second, pursuant to s 123(1)(b) of the Act I can award reimbursement of any wages or other money PCA has lost as a result of her grievance.

[55] Pursuant to s 128 of the Act, if I am satisfied that PCA has lost remuneration because of her grievance I should award the lesser of three months ordinary time remuneration or her actual loss.

[56] Three months ordinary time remuneration for PCA at Enhanceskin would have been 13 weeks wages based on 32 hours at \$24.00 per hour. This is \$9,984.00.

[57] PCA was able to retain her role at WSE. This role was for more hours but was paid at a lower wage rate. I calculate PCA's actual loss as follows:

- (a) For the period from 21 September 2015 until 1 June 2016, PCA worked 40 hours per week and was paid \$17.64 per hour. This is a period of 36 weeks, so total remuneration is $36 \times 40 \times \$17.64 = \$25,401.60$.
- (b) If PCA had worked at Enhanceskin she would have earned $36 \times 32 \times \$24.00 = \$27,648.00$.
- (c) The difference is $\$27,648.00 - \$25,401.60 = \$2,246.40$.
- (d) From 1 June 2016 PCA received a pay rise and was earning more than the amount she would have earned at Enhanceskin so there is no further loss.

[58] The lesser of the two sums is \$2,246.40 so, subject to any reduction for contribution, this is the remuneration that PCA is entitled to.

Contribution

[59] Pursuant to s 124 of the Act I must consider whether PCA contributed to her grievance in such a way that I should reduce the remedies that I have awarded.

[60] In *Xtreme Dining Ltd v Dewar*⁸ the Employment Court summarised the approach to contributory behaviour as follows:

[179] An analytical approach which has often been found useful was described in *Paykel Ltd v Ahlfeld*. Although that decision related to the correct approach to be adopted under s 40(2) of the Employment Contracts Act 1991, its terms are, for present purposes, closely similar. The three steps endorsed by the Court in that case are:

a) First, there must be a determination as to whether the employee has a personal grievance.

b) Secondly, the (now) Authority or Court must consider the extent, if any, to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. It is the “actions” of the employee which are to be considered if they contributed not to the actual personal grievance itself, but to the situation which gave rise to the claim that the employee has a personal grievance. In carrying out this step, there should be a consideration of causation in determining the extent to which the employee’s actions contributed to the situation giving rise to the personal grievance.

c) The third step is to be carried out if there is a causal connection between the actions and the situation that gave rise to the dismissal. If “those actions so require” the decision-maker must reduce the remedies that would otherwise have been awarded. The use of the word “must” demonstrates that the step is mandatory. The actions that require a reduction in remedies are actions which may loosely be categorised as being “culpable” or “blameworthy”.

[61] When assessing if PCA’s actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to her dismissal. If I am satisfied that there is a link then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.

[62] I accept that PCA did contribute to her grievance. There is a causal link between the failure by PCA to properly disclose her employment history and the subsequent decision by Enhanceskin to dismiss. The failure to disclose was seen as deliberately misleading – described as a lie by Dr Orsbourn - and it was this that led to him speaking to Intepeople and, it follows, that the subsequent actions occurred because of this non-disclosure.

[63] I am satisfied that the behaviour was blameworthy.

⁸ [2016] NZEmpC 136

[64] I have already discussed the tension between there being no obligation to disclose information about employment history and the obligation not to misrepresent the employment history, in pre-employment discussions, and have determined that this was not a circumstance where it can be said that dismissal was justified because PCA's failure to disclose information was a misrepresentation.

[65] However, that does not mean the decision not to disclose the period of employment with KWR was not blameworthy.

[66] In *Murray v Attorney-General*⁹ Chief Judge Goddard held that the dismissal of the plaintiffs, in circumstances where they failed to disclose material information in pre-employment negotiations, was not justified but based upon equity and good conscience the failure by the plaintiffs was sufficiently egregious to mean they could not complain about the dismissal.

[67] I take this to mean that notwithstanding the principle in *Bell* if the circumstances of the failure to disclose pre-employment matters are such that in equity and good conscience it is not right for the employee to effectively hide behind *Bell* then equity and good conscience should prevail.

[68] In this case I consider that given that PCA was applying for and accepting a position of trust – a sole charge position that involved handling money – it was important that Enhanceskin could trust her and be satisfied that she was honest. A decision to hide information that cast doubt on this trust and honesty causes some concern. Not because the missing employment history confirms that PCA was dishonest or could not be trusted as it does not do this; PCA was, after all, not convicted of theft and not dismissed for theft. Rather it is the decision not to disclose that casts doubt on PCA's honesty and trustworthiness. She was prepared to hide or ignore a matter rather than “front foot it”, as counsel for Enhanceskin described it, and this does not reflect well on her.

[69] As she was applying for a position requiring trust and honesty PCA should have shown that trust and honesty by disclosing a matter in her employment history

⁹ [2002] 1 ERNZ 184

that may have reflected badly on her, rather than hiding it. For this reason the failure to disclose was blameworthy or culpable¹⁰.

[70] It is also relevant that PCA signed the employment agreement with a declaration stating that the information she provided to Enhanceskin in connection with her appointment was accurate and not misleading. The failure to disclose the period of employment with KWR meant the information provided was not accurate.

[71] I conclude that PCA's remedies should be reduced by 25%.

Penalty

[72] In order to impose a penalty for a breach of the duty of good faith I must be satisfied that any failure by Enhanceskin to comply with the duty of good faith was "deliberate, serious and sustained" or intended to undermine the employment agreement.¹¹

[73] In order to impose a penalty against Enhanceskin I need to be satisfied that Enhanceskin intended to breach the duty of good faith.¹² I am not satisfied that this is the case here. This is particularly so because the action complained of was done by an agent of Enhanceskin and done without a direct instruction to act that way.

[74] I decline to impose a penalty against Enhanceskin for breaching the duty of good faith.

Determination

[75] David Orsbourn Medical Services Limited unjustifiably dismissed PCA.

[76] By way of remedies, David Orsbourn Medical Services Limited must pay PCA the following amounts, which includes a reduction of 25% for contribution:

- (a) \$6,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

¹⁰ In reaching this conclusion I do not, however, conclude that the failure was sufficiently egregious that PCA cannot claim unjustified dismissal or put another way, I am still not satisfied that failure to disclose was sufficient to justify the dismissal.

¹¹ Section 4A of the Act

¹² "Deliberate" requires proof of intention to breach the duty of good faith.

- (b) \$1,684.80 (gross) for lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[77] I will not impose a penalty against David Orsbourn Medical Services Limited for the alleged breach of the duty of good faith.

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority