

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 132
5404420

BETWEEN JASON RICHARDSON
 Applicant

AND FONTERRA COOPERATIVE
 GROUP LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Helen White Counsel for the Applicant
 John Rooney Counsel for the Respondent

Investigation Meeting: 13 August 2013 at New Plymouth

Submissions Received by: 27 August 2013

Determination: 21 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Richardson claims that he was unjustifiably dismissed from his tanker driver position with Fonterra Cooperative Group Limited (Fonterra).

[2] Fonterra denies Mr Richardson's claims and contends:

- (a) That there was a full and fair investigation;
- (b) That Mr Richardson failed to disclose his criminal and traffic convictions at the time of the recruitment process;

- (c) That it acted in accordance with its statutory obligations (s.103A (3)(a)-(d) of the Employment Relations Act 2000 (the Act)), and contractual obligations.

[3] Fonterra has opposed any remedies requested by Mr Richardson to resolve the employment relationship problem.

Issues

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

- (a) Could Fonterra dismiss Mr Richardson on the grounds and for the reasons relied upon;
- (b) Did Fonterra act fairly?
- (c) What were Fonterra's findings to conclude that Mr Richardson's action was a "*misrepresentation*" (27 November 2012 letter of dismissal)?
- (d) What were Fonterra's findings to conclude that Mr Richardson acted "*deliberately*" (statement in reply 22.3)?
- (e) Could Fonterra rely on dismissing Mr Richardson within the range of options available?

[5] The personal grievance arose after 1 April 2011, therefore the test is what a fair and reasonable employer could do, and that it applied the procedure under s.103A (3) (a)-(d) of the Act.

[6] During the Authority's investigation meeting Fonterra has relied upon the provisions of the Contracts Remedies Act to terminate the employment agreement and dismiss Mr Richardson. It has also relied on a number of cases for the Authority to apply in regard to misrepresentation.

[7] **Contractual Remedies Act 1979 (CRA)**

[8] Section 7 of the CRA provides the following:

7. *Cancellation of Contract*

- (1) *Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of*

the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

- (2) *Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.*
- (3) *Subject to this Act, but without prejudice to sub-section (2) of this section, a party to a contract may cancel it if—*
- (a) *he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or*
 - (b) *[a term] in the contract is broken by another party to that contract; or*
 - (c) *it is clear that [a term] in the contract will be broken by another party to that contract.*
- (4) *Where sub-section (3)(a) or sub-section (3)(b) or sub-section 3(3)(c) of this section applies, a party may exercise the right to cancel if, and only if, -*
- (a) *the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the [term] is essential to him; or*
 - (b) *the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be, -*
 - (i) *substantially to reduce the benefit of the contract to the cancelling party; or*
 - (ii) *substantially to increase the burden of the cancelling party under the contract; or*
 - (iii) *in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.*
- (5) *A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or*

misrepresentation or breach he has affirmed the contract.

- (6) *A party who has substantially the same interest under the contract as the party whose act constitutes the repudiation, misrepresentation, or breach may cancel the contract only with the leave of the Court.*
- (7) *The Court may, in its discretion on application made for the purpose, grant leave under sub-section (6) of this section, subject to such terms and conditions as the Court thinks fit, if it is satisfied that the granting of such relief is in the interests of justice.*

[9] Section 5 of the Contractual Remedies Act provides that parties may agree on a remedy for misrepresentation, which seems not to apply in the current case. Section 8 sets out the rules applying to cancellation of the contract, but not referred to directly by the parties.

[10] It is well established that failure to disclose information material to a decision to employ can justify dismissal:

- i. *Bourne v. Carter Holt Harvey Limited* [2011] NZERA Auckland 18;
- ii. *Lidiard v. New Zealand Fire Service Commission* ERA, Christchurch, CA51/10, 8 March 2010;
- iii. *Knedler v. Flight Centre (NZ) Ltd* [2011] NZERA Christchurch 118;
- iv. *Tai v. Robinson (T/A Coronation Lodge Rest Home)* [2004] 1 ERNZ 270;
- v. *Murray v. Attorney-General* [2002] 1 ERNZ 184 at 44;
- vi. *NZ Amalgamated Engineering etc IUOW v. Vehicle Assemblers of New Zealand Ltd* [1990] 3 NZILR 792.

[11] The above cases are all distinguishable on their facts. The cases outline the principles applying in regard to “misrepresentation” and the Contractual Remedies Act. In this employment relationship problem “misrepresentation” and the Contractual Remedies Act were being relied upon by Fonterra at the time. Fonterra is required to justify the dismissal (because of the termination of the contract) in terms of a personal grievance and the provisions of s 103A (3) (a)-(d) must apply and Fonterra has to show that Mr Richardson was given an opportunity to respond to Fonterra’s concerns, including relying on the Contractual Remedies Act. Fonterra has not relied on a disciplinary process but the ability to terminate the contract for

misrepresentation, but as a matter of caution purported to follow the requirements under s 103A (3) (a)-(d) of the Employment Relations Act.

The facts

[12] Fonterra is a large dairy cooperative. It employs tanker drivers driving 44 tonne vehicles on public roads. The tanker driver role involves in working remotely and autonomously and requires a high degree of trust and confidence. Also, the role requires drivers to interact with the public and Fonterra's customers (farmer shareholders), according to Fonterra's witnesses and its statement in reply.

[13] Mr Richardson completed a three stage application recruitment process. At each stage he indicated that he did not have previous convictions and was cleared to proceed to the next stage of the process. He was relying on his belief that he was covered by the Criminal Records (Clean Slate) Act 2004 ("Clean Slate Act") and he was reinforced in his belief that it did not apply because he relied on his partner's information about what it meant. She also helped him with the computer application. Mr Richardson says that he consented to a check of his criminal records, and repeatedly said that he did not understand that he had to disclose his convictions because of the Criminal Records (Clean Slate) Act 2004.

[14] Furthermore, Mr Richardson says he was never asked about any convictions, but that he told an interviewer "face-to-face" that he had some convictions more than seven years ago.

[15] The online application had a question as follows:

Question 6(f)

CRIMINAL HISTORY: Please disclose any criminal and/or driving convictions, other than offences you are not required to disclose under the Criminal Records (Clean Slate) Act 2004. If you are unsure, please visit www.justice.govt.nz for further information.

- *I have an investigation or prosecution pending.*
- *I am not currently being investigated BUT have had a criminal and/or driving conviction that did not result in a custodial sentence.*
- *I am not currently being investigated BUT have been sentenced to a custodial sentence in the past (i.e. imprisonment, corrective training borstal home detention).*

- *I DO NOT have any past or present criminal or driving convictions.*

[16] Mr Richardson, despite having previous driving and criminal convictions and having gone to prison, selected the option:

I DO NOT have any past or present criminal or driving convictions.

[17] The online application also included information on job background checks. The provision reads as follows:

Sometimes background check results are not confirmed until after employment has started. Please note that any information obtained will be checked with you for accuracy, but be aware that if you have not given Fonterra information that is relevant to the background checks or your general suitability for employment, or if you have provided misleading or false information, then this may be grounds for dismissal without notice.

[18] Fonterra says that Mr Richardson had the obligation to check on what to do using the Ministry of Justice website, which he was informed about in the online application. He did not do so, but left it to his wife to check much later. She did check it. She acknowledges now that she had made a mistake about the 'Clean Slate Act' and how it applied.

[19] Mr Richardson passed to the next stage of the appointment recruitment process. This was a telephone interview. It was conducted on 29 August 2012. The record of the interview is that he disclosed one speeding ticket, but not any of his other convictions.

[20] Mr Richardson passed next to a "face-to-face" interview. The interview took place on 6 September 2012. At that interview, he disclosed some minor historical offences, but not the full number of convictions or imprisonment or anything else, still believing he was covered by the 'Clean Slate Act'.

[21] On 2 October 2012, Mr Richardson was offered and he accepted the position of tanker driver with Fonterra at Whareroa. He gave permission for Fonterra to request from the Ministry of Justice (MOJ) his criminal convictions record. He was employed under a collective employment agreement, and his letter of appointment was unconditional.

[22] Mr Richardson was offered the job based on Fonterra's trust that he had provided accurate information and his representations that he had no previous convictions.

[23] Mr Richardson started work on 8 October 2012.

[24] On his first day, Mr Richardson reassured his lead driver that he had disclosed all his previous convictions.

[25] On 9 November 2012, Fonterra received Mr Richardson's Criminal Convictions Record (CCR). This detailed eight convictions between 1997 and 2004. Since then he has had no other criminal convictions and says that he has changed and turned his life around. The convictions at the time included:

- Driving with excess breath alcohol;
- Driving while disqualified;
- Theft as a servant.

[26] For these convictions, Mr Richardson was fined, put on community service, disqualified and imprisoned.

[27] The allegations from Fonterra that he failed to disclose his convictions were put to Mr Richardson on 12 November 2012. Fonterra considered this was a serious matter and that dismissal was a potential outcome. Mr Richardson was informed of his right to have representation and support in the matter.

[28] At a meeting on 14 November 2012, Mr Richardson had the opportunity to respond to Fonterra's allegations, and he did so.

[29] Further statements were obtained and checks made by Fonterra in the matter and Mr Richardson was given an opportunity to respond.

[30] On 21 November 2012, the meeting was reconvened and Fonterra put to Mr Richardson what it had found out. It was confirmed at this stage that the clean slate legislation did not apply because Mr Richardson had had a term of imprisonment. Moreover, the details were in the CCR.

[31] On 22 November 2012, Mr Richardson was given a preliminary view by Fonterra on the outcome it envisaged happening. At first Mr Rogers the team leader told him: “*that our intention today is to terminate your contract*” (minutes of meeting dated 22 November 2012). This was later corrected as to what was meant, meaning that they had “*got a bit lost*” and “*jumped to the proposal to terminate too soon*” (minutes of the meeting held on 22 and 26 November 2012 respectively). Indeed at the commencement of the next meeting on 26 November Mr Rogers told Mr Richardson he had every opportunity to respond and that Mr Rogers had not made a decision and that he had an open mind on the matter.

[32] Mr Richardson’s response was heard on 26 November 2012. His responses were further considered by Fonterra, and were rejected.

[33] He was instantly dismissed at the conclusion of the 26 November 2012 meeting. His dismissal was confirmed in writing on 27 November 2012. In the letter, Fonterra’s reasoning was as follows:

Dear Jason,

This letter confirms in writing the Company’s to terminate your contract, following a meeting held at the Whareroa Site on the 26th November 2012 at 8am.

At the meeting and after you were given the opportunity to add further comment, we confirmed to you and your representatives the outcome of the full and thorough investigation carried out in relation to: 1) Your failure to disclose all of your traffic and criminal convictions during the recruitment process.

The investigation established that during the recruitment process you provided incomplete information, when questioned about previous traffic and criminal convictions. We therefore relied on this information in making a decision to employ you.

The reasons you provided were that you and your partner completed the online application form, discussed your criminal history and you were both under the impression that your convictions had been wiped through the Clean Slate Act and therefore you did not disclose any previous convictions which were subsequently revealed through the Criminal Convictions Report received from the Ministry of Justice (MOJ). You became concerned after commencing your employment with us because of what other people/drivers were saying; your partner then telephoned MOJ some time after this and you felt their response to her/your questions were misleading. Despite this, you did not make either myself or the Depot Manager aware of your concerns or any convictions listed in the MOJ report mentioned earlier.

We find these reasons unacceptable as we must be able to rely on honest and accurate information provided during the recruitment process in order to make an informed hiring decision.

You have misrepresented yourself to the Company by failing to disclose all of your previous traffic and criminal convictions and as such we are terminating your contract with immediate effect.

Any moneys owing to you will be paid into your bank on 5 November 2012.

*Yours sincerely,
Lee Rogers
Team Manager*

(Emphasis added)

[34] In essence the reason for Fonterra dismissing Mr Richardson was that he had misrepresented himself for failing to disclose previous traffic and criminal convictions, and Fonterra terminated the contract immediately (without notice). The letter indicates that Mr Richardson had an opportunity to respond to the allegation and provided his explanation and that Fonterra considered it.

[35] Fonterra replied to the applicant's statement of problem with the reason for the dismissal as follows:

*2.33 Given the conclusion that Mr Richardson had **deliberately** withheld information material to Fonterra's decision to employ him, Mr Rogers decided that dismissal without notice was the appropriate outcome and advised Mr Richardson of this.*

(Emphasis added)

[36] The parties have not been able to resolve the employment relationship problem and it falls on the Authority to make a determination.

Determination

[37] Fonterra employed Mr Richardson as a tanker driver at its Whareroa site. His appointment was unconditional. Therefore when it found out that he had omitted to tell it of his convictions, it was required to follow a process, to determine any cause for dismissal.

[38] Fonterra's problem is that it appointed Mr Richardson unconditionally in regard to his collective employment agreement and the offer of employment letter. It

decided to continue with making a permanent appointment while waiting for the MOJ to provide Mr Richardson's criminal convictions record.

[39] I hold that once the appointment had been made Fonterra was not entitled to rely on the statement in the on line application form that said;

Sometimes background check results are not confirmed until after employment has started. Please note that any information obtained will be checked with you for accuracy, but be aware that if you have not given Fonterra information that is relevant to the background checks or your general suitability for employment or if you have provided misleading or false information, then this may be grounds for dismissal without notice.

[40] This is because the offer letter was unconditional. Although the offer required Mr Richardson to give his permission for Fonterra to obtain the criminal convictions record from MOJ there was no reference as to any misrepresentation and the consequences that could arise from it in the collective employment agreement and the letter of offer. Importantly the appointment process involved the collective employment agreement applying to Mr Richardson. In that agreement there is no misrepresentation provision underlying the appointment process, and more to the point clause 2.5 Completeness of the Collective Employment Agreement means that the CEA supersedes all other documents. Therefore the form does not apply from the point that Mr Richardson accepted employment.

[41] Mr Richardson explained that his omission had to do with his understanding of the 'Clean Slate Act' applying. In addition Mr Lee Rogers, team manager, acknowledged during his meetings with Mr Richardson and his union representatives the following (from discussion at the meetings):

- *Lee Rogers* *No we're not saying she's lying (Mr Richardson's wife on the MOJ); I just clarified before I consider everything said (21 November 2012).*
- *Lee Rogers* *I support you in that Steve, no one knew much about the clean slate Act... (22 November 2012).*
- *Lee Rogers* *I'm not clear on why you did not have any doubts soon after you signed the letter and filled in the request for criminal convictions record?*
- *Lee Rogers* *We do not doubt it's true (that is the statement by J R's partner) (22 November 2012).*
- *Lee Rogers* *I've noticed the change since I've known you and what you describe (responding the J R's response that he had changed his life around).*

- *Lee Rogers* *I have no doubt that under the right leadership you can become an asset to the Company* (responding to Mr Richardson’s assertion that *you can trust me; I am trustworthy you know*” (22 November 2012)).
- *Lee Rogers* *And you have proven that to us since working here* (responding to Mr Richardson’s claim that he is a good worker/driver) (22 November 2012).

[42] I am satisfied that at the time, despite Mr Richardson’s omission to provide the information, that Mr Rogers: (i) believed Mr Richardson’s partner about her contact with MOJ, (ii) had no criticisms of Mr Richardson’s work, (iii) acknowledged the issues about the ‘Clean Slate Act’, and (iv) believed that Mr Richardson had been trustworthy and had the potential to be an asset at work.

[43] Mr Richardson gave his permission for Fonterra to obtain the MOJ CCR that leads to the conclusion that Mr Richardson had nothing to hide.

[44] Fonterra has not been able to support that Mr Richardson “deliberately” misrepresented himself to get the job because:

- i. Mr Richardson only started to doubt the provisions about the ‘Clean Slate Act’ applying after his employment had started,
- ii. Mr Richardson’s genuine belief about the “clean Slate Act”,
- iii. Mr Richardson was relying on his partner’s experience, and she was genuinely wrong in her interpretation of how the Act applied, I hold.

[45] It certainly was open to Fonterra to conclude that Mr Richardson failed to provide the information, and to decide not to accept Mr Richardson’s explanations. However, Mr Rogers, the decision maker, never referred to using the allegation “deliberately” before the statement in reply was produced. It seems that Fonterra’s use of “deliberately” can only be to oppose Mr Richardson’s claim for reinstatement.

[46] The basis of Mr Rogers’ decision was:

- i. That Mr Richardson had opportunities to disclose: once on line when applying and then (a) during a telephone interview and (b) during a face to face interview.
- ii. That Mr Richardson had an opportunity to get independent advice when he started.

- iii. That he spoke with an old friend when he started work and that should have raised an alarm.
- iv. That the opportunity existed to get advice from MOJ early and at the time of the on line application since it was put in writing.

[47] I hold that Mr Richardson's dismissal was unjustified in that Fonterra could not as a fair and reasonable employer have dismissed him for the following reasons:

- (a) That it offered unconditional employment to Mr Richardson.
- (b) That there was no provision for dismissal in the collective employment agreement to cover its decision to wait on the MOJ criminal convictions record to be provided and that it knew that it would take time to get the CCR.
- (c) That the collective employment agreement made no provision for "misrepresentation" to terminate the contract.
- (d) That Fonterra was confused about the process that needed to be followed and settled on. It relied not on a disciplinary process for misconduct and/or serious misconduct, but to terminate the contract because Mr Richardson failed to disclose his convictions. Under the contract and the offer of employment it was not able to rely on this, I hold. That step is missing from the process.
- (e) That Fonterra did not in all probability put directly to Mr Richardson that he was accused of "deliberately" misrepresenting himself. His explanations were clearly rejected without Mr Richardson being informed of what the reasons were, I hold. He was entitled to know them and that he was being accused of deliberately misrepresenting himself to obtaining a job and that Fonterra was relying on his misrepresentation in terminating the contract.
- (f) That Fonterra has in its submissions relied on a 'misrepresentation' to terminate the contract under the Contractual Remedies Act. It never referred to this at all in the statement in reply, the reasoning for the dismissal, and more importantly never applied on notice that Fonterra intended to invoke the Act. The letter of dismissal never conveyed any reliance on invoking the Act. I hold that Fonterra was not entitled to cancel the employment agreement. I am supported by the unconditional employment agreement that applies. Also the

agreement superseded all other documents. Finally any expressed and/or implied agreement that Mr Richardson was telling the truth was affected by Fonterra's process to wait on the MOJ CCR, Mr Richardson's genuine belief about the "Clean Slate Act" and the evidence about how he was positively viewed in the job after he started. I am not satisfied that Fonterra has established the grounds to rely on the Contractual Remedies Act.

(g) Mr Richardson had no notice, no opportunity to respond and provide input before the decision was made in regard to the above grounds.

[48] Ostensibly Fonterra considered that Mr Richardson's omission occurred in the pre-employment phase of the recruitment process before he was an employee, and thus relied on terminating the contract for misrepresentation following an enquiry after employment had commenced. If it wanted to do this it had to arrange by negotiation the terms of employment to do so since it has decided to make the appointment and wait on the MOJ for the CCR.

[49] To terminate the contract Fonterra was required to give 4 weeks' notice and/or pay out four weeks in lieu of notice. Mr Richardson was dismissed instantly on 26 November when he was informed of the decision. Fonterra had no discretion on not paying notice when it relied upon terminating the contract for reasons other than cause for serious misconduct in his employment, and since it was not following and relying on a disciplinary process.

[50] A fair and reasonable employer could not have dismissed Mr Richardson. I hold Mr Richardson has a personal grievance for unjustified dismissal.

Remedies

[51] During the investigation meeting Mr Richardson conceded that it would be difficult to go back to work at Fonterra as reinstatement was being opposed and he was offended about being called a liar. The team leader at least had positive things to say about Mr Richardson's performance in the short time that Mr Richardson was there and that he could be an asset to the company with the right leadership. Other managers were adamant that he would not have been appointed if the information had been available at the time of the recruitment process. I have to agree. Mr Richardson's omissions were significant notwithstanding him and his partner being wrong about the 'Clean Slate Act'. Fonterra is right that he had every opportunity to

be open and communicative, but did not do so despite him having increasing doubts about the operation of the 'Clean Slate Act' after being appointed. I hold it would not be reasonable and practicable for Fonterra to reinstate Mr Richardson, given the zero tolerance applied to the CCR MOJ details.

[52] Mr Richardson's claim for lost wages amounts to a total of \$38,028.23 for two periods: (i) \$28,338.23 from 26 November 2012 when he was out of work; and (ii) \$9,690 from 12 April 2013 when he obtained a new job but at less pay. In total he is claiming lost wages for 38 weeks.

[53] I am satisfied that he has attempted in a small way before 12 April 2013 to get another job. However, he also decided to stay at home and child care while his partner obtained work. Thus, he would not have been available for work at that time. Since then he has got another job. I have also taken into account that Mr Richardson worked for Fonterra only for a short period and that he did not reasonably disclose and check the clean slate information earlier by properly finding out his responsibilities. I accept that he would not have passed the first check if he had disclosed properly the information required. Therefore I have restricted the claim for lost wages to 3 months under the Employment Relations Act (the Act) since Mr Richardson has a personal grievance, and further applied a reduction of 25% for contribution and blameworthy conduct. This is based on a reasonable expectation that Mr Richardson did not find out for sure what the requirements were when he started to have some doubts. Mr Richardson's weekly rate of pay based on an annualised formula is \$1,349. For three months using thirteen weeks (a quarter of the year) he would have been entitled to \$17,537: and with the reduction of 25% he is entitled to be paid (75%) \$13,152.75.

[54] I accept that his dismissal had an impact on him and that throughout the proceedings he was very much focused on getting his job back. He has claimed \$15,000 for compensation, but I hold that the evidence of the impact of the dismissal on Mr Richardson's feelings amounts to \$7,000, and he is entitled to \$5,250 of that.

The Authority's orders

[55] The claim for reinstatement is dismissed.

[56] Fonterra Cooperative Group Limited is to pay Jason Richardson:

- i. \$13,152.75 lost wages;
- ii. \$5,250 compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act.

Costs

[57] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority