IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 497
5423053

	BETWEEN	A Applicant
	A N D	B Respondent

Member of Authority:	James Crichton
Representatives:	Matthew Young, Advocate for the Applicant Richard Harrison, Counsel for the Respondent
Investigation Meeting:	15 and 16 October 2014 at Auckland
Submissions Received:	24 November 2014 from the Applicant 21 November 2014 from the Respondent
Date of Determination:	4 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (A) alleges that he was unjustifiably dismissed from his employment by the respondent (B) and he seeks the usual remedies, including in this case, reinstatement.

[2] An application for interim reinstatement was dealt with in the Authority in 2013 and A's application for interim reinstatement was refused by me in my determination dated 9 August 2013.

[3] That determination went on challenge to the Employment Court wherein the Court upheld the Authority's decision.

[4] The substantive personal grievance claim took some significant time to be brought on for hearing, partly as a consequence of A's change of representative. It is

enough to say that the delay was not occasioned by any default on the part of B nor by any unwillingness of the Authority itself to deal with the matter.

[5] A was employed by B as a workforce planner and commenced his duties on 29 October 2012.

[6] Prior to commencing employment, A was arrested by Police on 23 October 2012 and charged with the dishonest use of a document.

[7] A did not disclose that fact to B either at the time or when he commenced his duties.

[8] Subsequent inquiries by B satisfied it that A had no previous knowledge of the prospect of arrest or the allegation of criminal offending before the date of the arrest itself.

[9] Notwithstanding that, A attended at the District Court to appear on the first call on the criminal matter. This first call was on 10 December 2012, after the employment had commenced and it is common ground that A did not disclose to B that he required the relevant time off on that day (a working day of course) to attend Court; indeed, he told B that he required the time off to attend to a sick friend.

[10] On and from 4 January 2013, B began to receive calls from third parties providing B with information about A's appearance in the District Court.

[11] As a consequence of the intelligence from the telephone communications, B set a meeting with A and that took place on 10 January 2013. That meeting culminated in an agreement dated 14 January 2013 the burden of which is in dispute between the parties but for present purposes it is enough for me to record that the agreement proposed a basis on which the employment could continue unimpeded, subject to A providing information about the criminal allegations he faced, and the progress of those allegations in the District Court.

[12] One of the significant areas of dispute between the parties, about which more later, is A's contention that he fulfilled the terms of that agreement to the letter and B's conviction that he did not.

[13] On 5 March 2013, A made further appearances in the District Court at Hamilton where the original offence was withdrawn and four indictable offences were substituted.

[14] This event prompted B to write to A again on 19 March 2013 wherein B alleged:

(a) That the charges were escalating in seriousness; and

(b) That the four substituted indictable offences were signalled as early as 5 December 2012 (and yet B were not advised of that at the time or subsequently); and

(c) A was not assisting the Police as he ought to have been; and

(d) Material supplied to B by A's counsel on 13 March 2013 appeared to contradict A's earlier advice that there had been no documentation from Police.

[15] A responded through counsel by letter dated 21 March 2013 asserting his right to silence and the presumption of innocence and claiming that nothing in the allegations made against A by Police impacted on his present employment with B.

[16] A further meeting was sought by B and that meeting eventually took place on 3 May 2013 at which A was represented by another practitioner from his counsel's firm, one of the partners, Mr Utting. There is dispute about what happened at that meeting but B witnesses are clear that Mr Utting unequivocally proposed that B have access to the material which was just then being provided by Police in respect to the allegations Police made against A. The purpose of this proposed *open book* approach was to enable B to satisfy themselves that the matters in contention did not impact negatively on their need to have continued trust and confidence in A.

[17] Again it is sufficient for me to note at this point that the parties have very different views about what was agreed at that meeting; for B, the offer made by Mr Utting was an unequivocal offer without conditions and it gave them a comfort level that, subject to what was in the files provided by Police, they could make a proper assessment about the risk to them of the employment continuing unimpeded.

[18] To the contrary, Mr Utting maintains that while the offer was certainly made (and that is agreed by all the witnesses) it was always on the understanding that the offer was conditional on the approval of both A himself and A's counsel who, in effect, Mr Utting was representing at the meeting with B.

[19] In any event, B's expectation after the meeting was that arrangements would shortly be made between themselves and Mr Utting's office the effect of which was that a contractor to B (in fact a private investigator) would attend at Mr Utting's offices, review the material in the Police files, and then report to B.

[20] In fact, no such arrangements were made and B's position is that there was no substantive response from either A himself or from his representatives after the 3 May 2013 meeting despite numerous attempts by B, both formal and informal, to get some engagement from A's side.

[21] Those attempts by B to get that engagement included formal letters addressed both to A himself and letters on a counsel to counsel basis together with informal contact by B's counsel to Mr Utting in particular.

[22] In the result, and in the absence of any further engagement from A, B determined to dismiss A on 18 June 2013 which triggered the set of proceedings already referred to.

Issues

[23] It will be convenient if I consider the following questions:

(a) What was agreed by the parties in the 14 January 2013 letter;

(b) Did A mislead B as to the actual position with the criminal charges;

(c) Did A withdraw from contact with B post 3 May 2013 meeting;

(d) Do any of A's claims stand up to scrutiny?

[24] The first three issues that I refer to above were identified by me as the basis for B's decision to dismiss. They were recorded in my determination on A's interim reinstatement application at para.[35] of the 9 August 2013 determination.

[25] B agrees with my analysis that these were the bunch of issues which formed the basis for its decision to dismiss and the Employment Court adopted a similar approach in its consideration of the *de novo* challenge to my decision not to grant interim reinstatement to A.

[26] Overarching those essentially factual questions are the three contentions made on A's behalf in the letter from his counsel to B dated 21 March 2013. Those three contentions were first that A was entitled to assert the right to silence, second that he must be presumed to be innocent until found guilty by a Court of competent jurisdiction and thirdly that nothing relating to his criminal charges impacted on his employment by B. Those overarching issues will be referred to throughout the determination.

[27] This case concerns the interface between the obligations imposed on parties to an employment relationship where there is a supervening series of allegations against the employee in the criminal jurisdiction.

[28] An employee who is charged with criminal offending still retains obligations to his or her employer and subject to the protection of his or her rights in the criminal jurisdiction, it is not sufficient to simply assert the existence of criminal allegations in order to avoid the necessity to engage with the employer about its concerns concerning the employment relationship.

Did A fail to comply with the terms of the 14 January 2013 agreement?

[29] I am satisfied on the evidence I heard that A failed absolutely to comply with the terms of the agreement reached on 14 January 2013.

[30] In his evidence to me at the investigation meeting of the Authority, A emphasised his commitment to providing the information sought by the 14 January 2013 agreement (the agreement) and he referred in particular to the bullet points which follow on from a generic statement at the end of para.3 of the agreement.

[31] Because the matter is so closely focused on what the agreement actually says, it is appropriate that I set out the passage that I am referring to and about which there was so much argument. It is in the following terms:

> *It is our view that in the interim the situation is manageable from an employment point of view, providing that there is full disclosure, in particular that you will keep us informed of the following:*
>
> - *The Police investigation with respect to your charge and should this be withdrawn and/or whether any further charges are made against you and the nature of these charges.*
> - *Court dates and times including those that you will need to make an appearance.*
> - *Any changes in your approach to the charge (or any additional charges) including any change of plea.*
> - *The date(s) of any trial should the charge proceed to a full hearing and the final outcome when it is known to you.*

[32] I refer first to the initial words before the succession of bullet points. I agree with counsel for B that the meaning of those words is *clear and unambiguous.* The first point to note is the use of the expression *full disclosure.* It is difficult to understand how that expression can be minimised in the way that it appears A wants me to understand it. When I questioned him at the investigation meeting about that expression he persistently wanted to draw me down to look at the various bullet points that are appended thereunder and to claim that he had honoured those various bullet points to the letter.

[33] But full disclosure means just what it says; it does not mean that if one provides information pertaining to the subsequent bullet points one has disclosed all of one's obligations even assuming that I accept that A had in fact provided all of the material he ought to have under the individual bullet points.

[34] Indeed, A was quite explicit in his oral evidence that *I didn't understand the 14 January letter to require 'full disclosure' and I thought I should rely on disclosing what was required by the bullet points.*

[35] I am satisfied that any reasonable person in the situation that A was in would have understood B's need to have a full and frank explanation of whatever it was that A knew about the allegations of criminal offending.

[36] A worked in a senior position for an insurance company which, of necessity, required standards of probity and good behaviour from its employees which any

reasonable person would understand could potentially be compromised by allegations of criminal offending.

[37] The context is important. A had misled B about his first Court appearance; B had been told about that first Court appearance by a third party and had raised the matter with A in the 10 January 2013 meeting.

[38] It seems to me inconceivable that any reasonable person would not apprehend that, with that background, what B were effectively saying was that they did not want a repeat of the failure to disclose material particulars. They wanted to know what was happening and they were entitled to know what was happening.

[39] Despite A's earnest efforts to encourage me to conclude that what B were asking for was more than they were entitled to, I remain unconvinced. B were not conducting an investigation into the criminal allegations made against A and most particularly were not seeking any comments from A about his guilt or innocence, any admissions, or any other material which might impact on either his right to silence or the presumption of his innocence.

[40] They simply wanted to be told what factual matters he was facing, what he knew about those matters, what information had been provided to him by Police, and what other information if any he was in possession of so that the other party to the employment relationship (B) could form a proper balanced view about the risk to their business of A continuing to be employed in it, given A's criminal charges.

[41] Despite A's claim that he honoured his obligations under at least the bullet point aspects of the agreement, I do not accept that he did anything of the kind. He did not tell B of the 5 March 2013 Court appearance, a breach of his obligations under bullet point two. He did not tell B about the option held out by Police that, rather than be prosecuted for alleged offending, he *assist them with their inquiries*, a breach of bullet point three.

[42] A failed to report any of the occurrences in Court after those Court appearances, a breach of the *full disclosure* requirement and he failed to provide any information about the nature of the charges, a breach of bullet point one.

[43] A's evidence was that on the 5 March Court appearance issue, he had told his immediate manager that he was attending at Court but his immediate manager, who

gave evidence at my investigation meeting denied that he had done any such thing, and I believe her. B says that in any event A ought to have communicated not with his immediate manager but either of the senior managers of B that he dealt with in connection with the 10 January 2013 meeting and the subsequent agreement. I do not accept that view; although it is apparent that A's direct manager was not involved in the preparation of the agreement, there is nothing in the agreement which specially directs him to report to any particular person. If the authors of the agreement sought that, they ought to have required that in writing and they did not.

[44] Of more moment in my view is A's absolute failure to report on what happened at that Court appearance after the event. There is simply no evidence at all that A made any attempt to voluntarily disclose to B (as I am satisfied the agreement requires) what happened in Court, what his counsel says will happen next and matters of that kind.

[45] In order for B to get that information, or more accurately some it, Ms Katie Sutherland, a senior manager with B, had to make two requests for information during March 2013 which resulted in an email from counsel for A dated 13 March 2013.

[46] Next, A failed to disclose the apparent change in his position with respect to the prospect of his helping Police. Ms Katie Sutherland told me at the investigation meeting that A had given her the very clear impression at the 10 January 2013 meeting that the option of his assisting Police in order that they could make a case against another individual, was very much a live one and clearly that was an influencing factor for B in favour of giving A the benefit of the doubt.

[47] It is also apparent that there was a failure to report what happened after A's Court appearance in May 2013 and the evidence before me is clear that B used their best endeavours to elicit information about that Court appearance with a complete lack of success.

[48] Finally in this connection, I refer to A's absolute failure to disclose that four new charges had been laid indictably and when B was finally provided with that information after disclosing the new charges, it was clear that A and his advisers had known for some time that the new charges were in prospect.

[49] On the wider issue of disclosure of Police evidence against A, there was a lengthy delay in the arranging of the meeting between the parties which subsequently

took place on 3 May 2013. The delay was in part occasioned by A's counsel making the point in communications with B that disclosure from Police had yet to be provided in full and that the meeting ought not to take place until that had happened. B interpreted that intelligence as an intimation that A was proposing to disclose to it (B) the Police file whereas what I understood A to say was that his counsel was not in a position to meet with A's employer until he had received the full Police file.

[50] It is also clear from the evidence that that very issue dominated the second meeting between the parties on 3 May 2013. Again, context is important. In the course of the run-up to the meeting just referred to, B's expectation was that they could look forward to some disclosure from A and his representatives about just what the Police were reliant upon. The exchanges that I have just referred to between B and A's counsel impact on that issue. I am satisfied on the evidence I heard that there was a clear and straightforward misunderstanding between the parties about what was in prospect.

[51] B thought that the delay in the arranging of the meeting was because A's advisers wanted to have the complete Police dossier before the meeting and that that information would be shared with B whereas A's advisers it seemed were simply wanting to have the material available for them to study in anticipation of engaging with B.

[52] In any event, whatever the precursor to the meeting, B's representatives at that meeting were absolutely explicit in the evidence they gave at the Authority's investigation meeting that Mr Utting, who attended the meeting as A's counsel, although he had not previously been involved, made a straightforward offer to B to allow them access to A's Police files to demonstrate the flimsy nature of the Police allegations against A.

[53] It is important that I make clear that A was present at this meeting and it is common ground (including from A himself) that the offer just referred to by Mr Utting was made and that A did not protest it at the time.

[54] Mr Utting now says (including in his evidence at my investigation meeting) that the offer was always contingent on the approval of his client (A) and also his colleague Mr John Moroney who was A's counsel in the criminal proceeding.

[55] It is difficult to understand why A would need to be consulted about whether he approved or not of an offer made by his legal representative in a meeting that both A and his then legal representative were physically present at. Presumably, if A had any objection to the offer being made, he ought to have said so at the time, and he did not.

[56] I am impelled to the conclusion that the only logical interpretation of the events of the disputed meeting on 3 May 2013 is that Mr Utting was quite properly intent upon trying to convince B that there was nothing to the charges made against A and that in pursuit of that endeavour, he proposed that B review the Police file and that no objection to that approach was taken at the time by his client A.

[57] Consistent with that approach is the letter that was then sent on B's behalf to Mr Utting seeking to set up the arrangements whereby B's agent would review the material and report back to B about it.

[58] It seems to me inconceivable that if Mr Utting objected to the claim made in the B letter that an arrangement to inspect the Police file had been made, he would not have responded to B by return, and objected to their contention that such an arrangement had been made. There was no such response from Mr Utting.

[59] A told me at the investigation meeting that his belief was that the 3 May 2013 meeting had adjourned rather than completed and it had adjourned on the footing that Mr Utting was to revert to B with a proposal of some sort.

[60] That evidence is completely inconsistent with the letter sent by B to Mr Utting that I have referred to and with Mr Utting's failure to quarrel with the terms of that letter if he did not agree with it. Moreover, if the meeting had been adjourned in anticipation of a proposal emanating from Mr Utting or someone else from A's side, no such proposal ever arrived. Indeed, I am satisfied that the third basis on which A was dismissed from his employment was his complete failure to engage with his employer after that 3 May 2013 meeting.

[61] I should make clear at this juncture that I have no reason to doubt the integrity of Mr Utting despite his involvement in these matters. I am satisfied on the evidence I heard that any default in the communication with B was caused by Mr Utting's inability to get sensible instructions from A and had nothing whatever to do with Mr Utting's own engagement in the matter.

Did A mislead B about the actual position?

[62] I am also satisfied on the evidence I heard that A misled B about the actual position.

[63] B say that A mislead them about the position from the beginning of the employment, first by failing to disclose the initial allegation made by Police shortly before the employment commenced, then by misrepresenting the position at the 10 January 2013 meeting, and then by continuing to misrepresent or mislead them throughout the engagement between the parties down to dismissal.

[64] I agree with that summary of the position. It is appropriate to note though that in relation to the initial arrest, A's failure to notify B of that was effectively condoned by B and I take that matter no further.

[65] However, the subsequent behaviour of A was never condoned. In the meeting held between the parties on 10 January 2013, A minimalized the criminal allegations and in particular did not make clear that more charges were pending. This is so notwithstanding the fact that subsequent revelations provided to B after persistent requests resulted in the disclosure of a letter dated 5 December 2012 that *further charges will be laid in respect of his actions … and that it is anticipated that these matters will be laid in the New Year. Those matters will be made indictably.*

[66] It will immediately be discerned that that letter, dated as it is, 5 December 2012, pre-dates the 10 January 2013 meeting between the parties. B say that A knew or ought to have known that further charges were to be made as a consequence of the receipt by his counsel of that letter and that those further charges would be made indictably. Given that state of affairs, B say A misled them at the 10 January 2013 meeting by failing to make that information available to them and I agree.

[67] A told me that he believed on advice (presumably Mr Moroney's advice) that there would not be further charges laid and that is why he took the stance that he did at the 10 January 2013 meeting.

[68] But if that is right, it is still in my view wrong of him to have not given B the full picture by providing the information in the letter from the Police of the previous month.

[69] In effect, by minimising the prospect of further charges being laid, by failing to tell B that those further charges potentially existed and that they would be made indictably, A was creating a false impression about his circumstances and painting a false picture of the effect (if any) on his employer of these allegations.

[70] Moreover, I accept B's submission that correspondence subsequently received from counsel for A must be read so as to confirm that A knew about the four substituted indictable charges, if only because, were that not the position, Mr Moroney's correspondence at various points would make no sense and it has to be assumed that a competent practitioner would disclose to his or her client significant correspondence received from Police relating to charges that client might subsequently face.

[71] It seems to me to be of great importance that an employee in circumstances such as those faced by A is absolutely *open* and *communicative* with his or her employer and does not seek to shelter behind legal advice given at the time.

[72] The obligation in the employment relationship is on the employee; it is their employment relationship and they have a duty in terms of s.4 of the Employment Relations Act 2000 (the Act) to communicate openly and frankly with their employer about matters pertaining to the employment.

[73] The only gloss on that is that an employee is not required to incriminate him or herself but nothing about the allegation of misleading B goes to self-incrimination. What A stands accused of is of failing absolutely to disclose to B relevant particulars about changes to the charges that he was facing and his obligation is to provide that information to B as soon as it becomes known to him or to his adviser.

[74] As I have already noted, the correspondence received by B from Mr Moroney is completely inconsistent with A not being very clear about the extent of his difficulties in the criminal court and in those circumstances, I am satisfied that A adopted a technique of failing to provide B with sufficient information so as to ensure they were fully apprised of his circumstances either by withholding information or by purporting to shelter behind claims that he had been advised by his counsel not to disclose various matters because of either the right to silence or the presumption of innocence. I am satisfied that neither of those fundamental human rights impact on an employee's obligation to provide an employer with material facts about the extent of

the charges being faced as soon as that information comes into the possession of the employee and I simply do not accept A's contention that he did not know about the additional charges when he met with B on 10 January 2013.

Did A withdraw from contact with B?

[75] I am satisfied on the basis of the evidence I heard that A simply withdrew after the 3 May 2013 meeting and despite numerous attempts by B senior managers and by B's experienced counsel to engage either with A himself or with his legal advisers, there was no substantive response post the 3 May 2013 meeting. In those circumstances, it is difficult to see what else B could have done other than conclude that A was no longer prepared to engage with them at any level and therefore determine to terminate the employment relationship.

[76] I note for the sake of completeness that the same conclusion was reached by the Employment Court in its *de novo* hearing of the application for interim reinstatement.

[77] It is evident to me on the evidence I heard that after the 3 May 2013 meeting, Mr Utting was struggling to get sensible or indeed any instructions from A and in that circumstance, I am not persuaded A can again try to shelter behind conversations that clearly took place between Mr Utting and counsel for B where I am satisfied, Mr Utting, in good faith, was endeavouring to facilitate matters but without the benefit of any proper instruction from A.

[78] To emphasise that point, it is appropriate to refer to A's first affidavit filed in the Authority and dated 18 June 2013 where A represents himself as being shocked by the suggestion that Mr Utting should have contemplated providing the Police file to B. That passage seems to me to give clear support to the view that Mr Utting had no proper instructions from A.

[79] It is apparent on the evidence that A received correspondence from B post 3 May 2013 either directed to him personally or to counsel, and yet he made no substantive response. Indeed, the evidence given to my investigation meeting by Mr Utting confirmed to my satisfaction that Mr Utting was effectively not instructed and was simply using his best endeavours to try to resolve matters. If that puts it too strongly, Mr Utting's own written briefs of evidence make it clear that he was

certainly not instructed on the employment matter, even if he would seek to claim that he still had viable instructions in relation to the criminal matter.

[80] I think I am entitled to conclude on the evidence I heard that A was neither engaging with B nor with his own legal advisers as both those parties seemed to be frustrated by their inability to get some sensible engagement from A.

[81] It seems to me that A believed that in not engaging with B in particular, he was simply pursuing his legal rights to silence on the one hand and to the protection from self-incrimination on the other.

[82] As I have already noted, there is a huge gulf between the right to silence and issues about self-incrimination on the one hand and the provision of factual information about charges faced and proceedings in the criminal court, on the other. A cannot shelter behind the Bill of Rights protections as a basis for refusing factual information which only he has access to. I am satisfied B are entitled to know what allegations A faces and when those allegations are to be dealt with and whether there is any change in the allegations faced. I am satisfied that is the position even if there were no agreement between the parties which is relevant to the particular circumstances of this case.

[83] But A relies on the Bill of Rights protections especially on the question of whether B should see the Police file. In his affidavit dated 26 September 2014 which was filed in anticipation of the substantive investigation meeting, A had this to say:

> *B were not entitled to review any of this evidence (the Police evidence), and if they were doing so, it would be grossly unfair to me as for me to answer the evidence could jeopardise my statutory rights.*

[84] I am satisfied this statement by A completely mis-represents what B were proposing; there was never any intention by B to engage with A about what was in that material.

[85] What B proposed, and what it understood Mr Utting to be suggesting, was B have access to the Police file so that B could assess the risk to its business of the criminal charges that A was facing. B was never proposing that it would engage with A and seek any representations from him on the matter.

[86] And in the absence of any requirement that A should engage with B on his side of the story, to put it colloquially, there can be no breach of A's rights.

[87] Understandably, A relies on the well-known decision of Judge Shaw in *Wackrow v.Fonterra Co-Operative Group Ltd* [2004] 1ERNZ 350. What *Wackrow* says is that if B had chosen to conduct its own inquiry into the alleged criminal offending and in the course of that inquiry had asked A for his explanations, then that would infringe A's Bill of Rights protections. It is not authority for the proposition that any enquiry or information sought by an employer, where an employee is facing criminal investigation, is improper; it depends on the enquiry or information and each case must be decided on its own merits.

[88] Put another way, and adopting the language of my colleague Member Fitzgibbon in *A v. The Company* [2014] NZERA Auckland 414, the employer is entitled under *Wackrow* to " conduct its investigation…" but is " .. restrained from asking … any questions which bore on or related to the substance of the criminal charge…".

[89] I say again that all B were proposing was a review of the Police file to assess the potential damage to their business of the alleged offending. It was never their intention to engage with A at all about his explanation and in the absence of any engagement with A, his right to silence and the presumption of innocence are completely untrammelled. Here what was proposed was never a questioning of A at all but rather a review of the material on the Police files, well away from the effect of *Wackrow*.

Do any of A's claims withstand scrutiny?

[90] A advanced a number of propositions about B's behaviour which I refer to now. First, there is an allegation of predetermination. I have not been persuaded that B pre-determined A's dismissal; the evidence is otherwise. The evidence is that B tried very hard to preserve the employment. That is the purpose of the 14 January 2013 agreement and their various subsequent attempts to get the agreement complied with by A.

[91] Moreover, A's reliance on the evidence of Mr Utting, concerning the very end of the employment is, I think, misplaced. There was an email from B dated 13 June

2013 to A indicating a provisional conclusion to dismiss because of the nearly six weeks of an " .. absence of co-operation..".

[92] Mr Utting's evidence is that he was told around that date (13 June 2013) by B that whatever A did at that stage, B had determined to dismiss. I cannot place too much reliance on this as Mr Utting did not remember exactly when this observation was made and in any event it is inconsistent with the primary source being B's email of even date, which invites a response.

[93] Furthermore, the relevance of the date comes into stark focus when it is remembered that despite the timeline proposed in the 13 June 2013 email, yet another extension was granted by B in an effort to get A to respond so even if it were accepted that B were disposed to dismiss on 13 June 2013, come what may, that date was further extended to 18 June 2013.

[94] A also alleges that there were breaches by B in hiring the private investigator to attend the District Court when A appeared (and not disclosing that) and failing to name the persons who rang B to give information about A's appearances in the criminal court and rather describe those individuals as anonymous when some of them anyway were known to B.

[95] But B faithfully provided the information the callers gave them to A and if A had wanted to know who these folk were, he could have asked but did not. I am not persuaded their names, where known to B, was in any way relevant to the issues between the parties. The fact is these people provided B with information which B had a right to expect from their employee and notwithstanding his breach of the good faith obligation; B told A everything they obtained from their informants.

[96] Given A's evident breaches of good faith in his role as employee, it is difficult to see what else B could have done than to have hired a private investigator to try and get information that A was not providing to them. All the private investigator did was report what happened in court when A appeared, information which, given A's default, would not otherwise have been known to B. It is true the private investigator got some information wrong (specifically the charges A was facing) but B re checked the material and realised the private investigator was mistaken.

[97] Neither of these last two issues, raised by A, go to the merits. The law requires that the parties are responsive and communicative with each other in actively

maintaining a productive working relationship; the essence of the information from the callers B provided to A, and it is difficult to be critical of their hiring a private investigator when that was only necessary because A had failed in his obligations to be responsive and communicative with his employer.

[98] While I accept that B did not disclose to A the names of some of the folk who communicated with them about A's attendances at the criminal court, I have not been persuaded that the failure to name the individuals known to B have any effect on the outcome or any relevance at all to the proceeding.

Determination

[99] I have not been persuaded that A has any viable personal grievance and is accordingly not entitled to any substantive remedies. My considered view is that A was given every opportunity by his employer to engage appropriately with the employer after the employer discovered (without any cooperation from A) that he had been charged with criminal offending.

[100] Notwithstanding those allegations, B quite properly sought to engage with A, to get his commitment to making full and frank disclosure as the process unfolded and in return B would persevere with the employment.

[101] I am satisfied that even if there were no agreement between the parties, B would still have been well within its rights to expect full disclosure of the factual matrix concerning the criminal charges, but the fact of the agreement made the obligations on A even greater. I am satisfied that he failed to meet his obligations in respect to that agreement by failing to be open and communicative with his employer, thus being in breach of s.4 of the Act requiring good faith of him as well as of B.

[102] I also think that A misled B in failing to disclose to them as soon as he knew that the charges had been upgraded from one charge to four and that in the meeting of 10 January 2013, in failing to make that disclosure, he either deliberately or inadvertently misled the employer of the actual position.

[103] Finally, I am satisfied that in the evident failure of A and his advisers to substantively respond to B after the 3 May 2013 meeting, A created the environment where it became more likely than not that B would lose trust and confidence in him because he had failed to behave towards his employer in good faith and by ceasing

engagement had created an environment where it became inevitable that B would think that trust and confidence had expired completely.

[104] It follows from the foregoing that A's claim fails in its entirety.

Costs

[105] Costs are reserved.

James Crichton
Member of the Employment Relations Authority