



New Zealand Employment Relations Authority Decisions

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Bourne v Carter Holt Harvey Limited [2011] NZERA 20; [2011] NZERA Auckland 18 (17 January 2011)

Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 18 5291366

BETWEEN JAMES COWLEY BOURNE

Applicant

AND CARTER HOLT HARVEY

LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Louise Darroch, counsel for Applicant

David France, counsel for Respondent

Investigation Meeting: 21 December 2010

Determination: 17 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr James Bourne, applied to have the Authority investigate a claim that he was unjustifiably dismissed from employment with the respondent, Carter Holt Harvey Limited (CHH).

[2] To resolve his personal grievance above all else Mr Bourne sought reinstatement to the employment. Of much lesser importance to him were the recovery of lost earnings and compensation for humiliation, loss of dignity and injury to feelings, although he sought those remedies too.

[3] Mr Bourne and CHH tried to resolve the employment relationship problem by mediation, before the Authority was asked to investigate.

[4] Between April 2000 (when he was 19 years old) and December 2003 (when he was 23) Mr Bourne was convicted by the District Court of five offences. He did not receive a custodial sentence for any of them but was fined on one occasion and ordered to carry out community service on two others. Mr Bourne's most recent conviction, in December 2003, was met with a suspended sentence which required him to come up for punishment if called upon. The charge on that occasion arose from damage he intentionally caused to some doors.

[5] A certified copy of his Entry of Criminal Record shows that Mr Bourne pleaded guilty to that most recent charge on 17 December 2003, in the District Court at Auckland, before being convicted and sentenced at the same appearance.

[6] In 2009 Mr Bourne started working as a forklift driver at a CHH site in Mangere. For several months his employer was a temping agency but from what it observed of his performance CHH considered that he was suitable for employment by the company and invited him to apply for a job. He did so by completing and signing a comprehensive application form in which

was included the following advice:

You should ensure that the information you provide is entirely accurate. The provision of false information is grounds for dismissal if your application is successful.

[7] In response to a question in part of the form "Have you ever been convicted of a criminal offence?" Mr Bourne ticked the "No" box. He signed a declaration that the particulars in the form were "true to the best of my knowledge". He also gave a declaration that:

... to the best of my knowledge the answers in this application form are correct and I understand that if any false or misleading information is given, or any material fact suppressed, I will not be accepted, or if I am employed, my employment will be terminated.

[8] Mr Bourne signed his declaration on 27 August 2009.

[9] After submitting the job application Mr Bourne received from CHH a letter containing an offer of employment and a copy of an employment agreement, on or about 3 September 2009. The letter began with the following:

We are very pleased to be able to offer you employment with Carter Holt Harvey Packaging in the position of General Hand with the Case Auckland team. As discussed, this offer is conditional upon satisfactory results from the Carter Holt Harvey pre-employment medical and drug tests, and criminal record checks.

[10] The employment agreement included the following term:

Basis of Offer

This offer of employment with Carter Holt Harvey is conditional upon a satisfactory outcome from the pre-employment medical, criminal record check and drug test.

[11] Mr Bourne signed the employment agreement on 7 September 2009. By doing so he expressly affirmed the following:

(b) I have not deliberately failed to disclose any matter which may have materially influenced the company's decision to employ me.

Do you have a criminal record of conviction for an offence that would in any way be relevant to the position you are accepting at Carter Holt Harvey? Yes/No

You acknowledge that by signing this contract that a misleading or false answer to this question may result in disciplinary action and summary dismissal from employment with Carter Holt Harvey.

[12] Mr Bourne also acknowledged in signing the agreement that he had had a reasonable opportunity to seek independent advice before accepting the offer of employment.

[13] With regard to the conditional basis of the offer, CHH applied to the Ministry of Justice for criminal conviction information held in relation to Mr Bourne. It did so on about 14 September 2009, a week after Mr Bourne had become employed by CHH. In response to the request 10 days later the Ministry sent a copy of a Criminal Convictions Report recording the five convictions Mr Bourne had accrued between April 2000 and December 2003. The Report gave the nature of the charge in each case and sentence imposed.

[14] After considering that information CHH requested Mr Bourne to attend a meeting. He was advised its purpose was:

. to discuss and investigate concerns we have in relation to the misrepresentation of personal information you supplied on your application form.

[15] Including a weekend Mr Bourne was given about three days notice of the meeting and was invited to bring a representative if he wished. He was also warned that the matter was serious and could result in disciplinary action in the form of dismissal.

[16] Mr Bourne attended the meeting with his representative who was an official of his union with some experience of such meetings at the CHH worksite.

[17] At the meeting Mr Bourne was shown the information obtained from the Ministry of Justice about his convictions. There was no dispute that the information related to him or that it was correct. Mr Bourne used the opportunity given to him to provide an explanation for failing to disclose this information as had been required of him by the employment application form.

[18] His explanation was, I find, that he had discussed with his supervisor, Mr Rodney Eastham, the requirements of the form to provide information about any convictions. In that discussion he disclosed that he had been convicted of car conversion,

but as Mr Eastham had reassured him that that particular conviction was unlikely to prevent him becoming employed he had stated on the form that he had no convictions at all. Mr Eastham confirmed to CHH during the meeting that he had given Mr Bourne some encouragement to think he would be accepted for employment. He said he had done so with the understanding gained from Mr Bourne that the conviction had been entered when he was a minor or a juvenile and that it was his only conviction. The Record showed he was 19 when convicted of car conversion and that he had accrued several other convictions as well.

[19] The meeting was adjourned and Mr Bourne's explanation was considered but not accepted by the company. In advising him on 6 October 2009 of his immediate dismissal the company also advised:

We consider this to be misrepresentation of personal information which is deemed serious misconduct under the Company policies and procedures.

[20] Mr Bourne raised a personal grievance with CHH on about 5 November 2009. In particular he complained:

The dismissal process which was taken by Carter Holt Harvey Management was very stressful and caused me mental anxiety because I was not clearly informed of what I had done wrong.

Test of justification - s 103A of [Employment Relations Act 2000](#)

[21] The Authority must determine Mr Bourne's claim of unjustified dismissal against the test of justification at [s 103A](#) of the Act. It must consider whether the actions of CHH were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. This must be determined on an objective basis.

[22] It was argued for Mr Bourne that he had acted honestly, without intent to deceive or mislead, in filling out the application form and signing the offer of employment and employment agreement. The employer, however, after conducting a disciplinary inquiry concluded otherwise. The question is whether it was fair and reasonable for the employer not to accept Mr Bourne's explanation of innocent mistake?

[23] In the circumstances of this case I find the rejection of Mr Bourne's explanation was the action of a fair and reasonable employer. In my view, CHH management who conducted the disciplinary inquiry were reasonably entitled to believe that Mr Bourne had not forgotten about the offending for which he was convicted, even although that had occurred some six years before he filled in the employment application form. A further factor was the number of other charges he also did not disclose, making it less likely that Mr Bourne had simply forgotten about them.

[24] It is clear that CHH did not accept the explanation of Mr Bourne that the reassurance Mr Eastham had given excused him from telling the truth, as he was required by the employment application form to do. That reassurance had been based on an incomplete and inaccurate picture given by Mr Bourne of his record of offending. I find that presented with the explanation of Mr Bourne and the information given by Mr Eastham, the employer acting fairly and reasonably was entitled to prefer one account over the other, which in this case was that of Mr Eastham.

[25] I agree with the submission of counsel for CHH, Mr France, that it was reasonable for the employer not to accept Mr Bourne's explanations for his failure to declare his previous convictions. I find, as also submitted, that his explanations were carefully evaluated before being rejected as not being credible.

[26] It may be noted that notwithstanding the reassurance or encouragement given by Mr Eastham, the offer of employment subsequently given to Mr Bourne by CHH with regard to the continuation of his employment contained no waiver as to the importance to the employer of his offending history, if he had one.

[27] Explanations Mr Bourne gave after his dismissal do not fall within the scope of [s 103A](#) as "circumstances" known to the employer at the time the dismissal occurred. I can therefore take no account of those explanations, first given in the statement of problem, that Mr Bourne had believed the [Criminal Records \(Clean Slate\) Act 2004](#) applied to his convictions and that a conviction had not been entered against him in December 2003 following the guilty plea he gave to charges of wilful damage.

[28] Whatever Mr Bourne's belief, which he did not communicate to CHH, about the application of the Clean Slate Act, that legislation did not apply to him since his last conviction was less than seven years before he attempted to conceal his record. With regard to the second explanation belatedly offered, it is implausible and also inconsistent with an earlier explanation that he could not remember being convicted. This is inconsistent with an explanation given by Mr Bourne that he was fully conscious of the stigma likely to be attached to criminal convictions when seeking employment, particularly those involving offences of dishonesty. Mr Bourne also seems to have confused the wilful damage charge with an attempt to commit a more serious offence of assault. From the vivid account he gave of the occasion, it is one he is likely to have remembered

[29] In relation to the 2003 conviction for wilful damage, as Mr Bourne explained when he attended Court and pleaded guilty he had been expecting a sentence of something more than being called upon to come up for sentence within 12 months. After entering his plea Mr Bourne had stood before a Judge while the summary of facts was presented to the Court, and conviction

was then recorded by the Judge and sentence passed. Mr Bourne is unlikely to have forgotten this conviction.

[30] These *ex post facto* explanations can form no part of the Authority's considerations to be given under [s 103A](#) of the [Employment Relations Act](#), as they were not given to the employer for it to consider before dismissal was decided upon.

[31] Mr Bourne complained to the Authority about the standard of his representation at the disciplinary inquiry. His choice of representative was his responsibility, but he used a union official who had some experience of dealing with management in this particular workplace. The basis of this complaint simply seems to be that the representative could not prevent the employer from being compelled by the facts to find the existence of serious misconduct and from deciding to dismiss. I do not consider there is any lack of procedural justification in the way the disciplinary inquiry was held or in the way Mr Bourne was notified of it and supplied with information before and during it.

[32] I do not accept the submission on behalf of Mr Bourne that his failure to disclose the particular conviction from December 2003 did not amount to serious misconduct. I find that CHH had quite clearly identified that conduct as a potential ground for dismissal if it occurred. It did this in the application form and also by making the truth of information supplied a condition of the offer of employment.

[33] Mr Bourne was entitled to invoke the personal grievance remedy to challenge the justification for his dismissal by the employer. However, the employer was also entitled to invoke the expressly conditional nature of the employment entered into. The condition was clearly stated in the offer of employment. CHH fairly enquired as to why Mr Bourne had not met the condition before it rejected his explanation and brought the condition into operation. As a term of the agreement, continuity of the employment was dependent on the condition being satisfied. Mr Bourne had accepted the job on that basis.

[34] Since this case CHH has apparently found it is safer not to offer employment until it has received the response from the Ministry of Justice about criminal convictions, but no criticism can be made of its preparedness to trust an applicant to give the correct information and allow the person to commence employment at an earlier time without delay. Trust is required to be a foundation of any employment relationship.

Determination

[35] For the above reasons the Authority finds, in applying the test under [s 103A](#) of the [Employment Relations Act](#), that the dismissal of Mr Bourne was justifiable. The actions of CHH and how CHH acted were, viewed objectively, what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[36] Accordingly I find that Mr Bourne does not have a personal grievance.

Costs

[37] Costs are reserved. An application on behalf of CHH may be made in writing no later than 1 February 2011. A reply on behalf of Mr Bourne may be given in writing no later than 15 February 2011.

A Dumbleton

Member of the Employment Relations Authority