

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 174
5348854

BETWEEN MALCOLM JOHN BURNS
Applicant

AND SOUTHERN DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Philip Cheyne

Representatives: Janet Marquet, Counsel for Applicant
Peter Churchman, Counsel for Respondent

Investigation Meeting: 4 November 2011 at Dunedin

Determination: 14 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Malcolm Burns was employed by the Southern District Health Board as Supply Chain Improvement Leader from about November 2010 until his dismissal on 8 April 2011 arising from his conviction on three criminal charges for pre-employment conduct.

[2] Mr Burns says that he was unjustifiably dismissed. It is helpful to summarise his grievance. There are some factual disputes about the extent to which he advised SDHB about the pending criminal charges prior to his employment and their progress during the employment. Mr Burns says that he pleaded guilty to the three remaining charges because he could not afford to continue to defend himself rather than because of his guilt. Nor does he accept that his convictions are such that he could justifiably be dismissed by SDHB. Finally Mr Burns says that SDHB pre-determined the decision to dismiss him.

[3] To resolve this problem I will explain more fully the sequence of events before applying the statutory test for justification of this acknowledged dismissal. Because the dismissal occurred after 1 April 2011 I must apply the law as amended with effect from that date.

The employment

[4] Mr Burns is very experienced in the management of supply chain logistics. He applied for the position and was interviewed. In his written application, in response to a question about criminal convictions or pending charges, he wrote:

Some historic traffic offences, and I have a current legal issue relating to our insurance company who have attempted to get out of covering items that were stolen from us some 12 months ago. Very frustrating and would appreciate the opportunity to explain the issue.

[5] There is some dispute over precisely what Mr Burns told those who interviewed him but it is not necessary to resolve that. Mr Burns protested his innocence of the charges he then faced. SDHB took the position that they should let that matter be resolved by the criminal processes. Mr Burns was offered employment subject to a police check. Mr Burns gave his consent to the police check and accepted the offer of employment.

[6] The employment agreement included provision for its termination *if you are convicted of a criminal offence which impacts on your ability to meet the requirements of your role.* The agreement also included as part of the definition of serious misconduct *admitting to, or being convicted of, any offence which, in the opinion of the DHB, brings into question the employee's suitability for continued employment.* These and the other terms of employment were agreed to by Mr Burns when he commenced work on 3 November 2010.

[7] The police check was received by SDHB on 13 November 2010. It recorded:
*3 CHARGES PENDING
REAPPLY: Early March '11*

[8] There was a meeting between Mr Burns, his manager (Keri Yeo) and a SDHB HR advisor (Grant O'Kane). There is a dispute about the date of the meeting but that

is not important. It is common ground that Mr O’Kane made some notes during the meeting. His evidence, which I accept, is that he later wrote out the notes that have been produced in evidence. The original notes made during the meeting are no longer in existence. However, I accept that the exhibited notes should be treated as a contemporaneous account of the meeting. For present purposes it is sufficient to record the following: that SDHB acknowledged that Mr Burns had mentioned pending charges during his interview; that Mr Burns clarified that the charges related to pecuniary gain and a false insurance claim of possessions stolen from his property; that he strongly protested his innocence and that the Judge had told the police to reassess options in relation to the charges; that there would be a court case in March 2011; and that SDHB would await the outcome of that case but warned him if there was a guilty verdict they would have to consider the termination of his employment. Mr Burns’ evidence is that he was never told prior to 18 March 2011 that his employment would be in jeopardy depending on the outcome of the criminal charges. I do not accept that evidence and prefer the evidence of both Mr O’Kane and Ms Yeo on this point.

Progress of the criminal charges

[9] Mr Burns’ evidence is that on at least three occasions he discussed the evolving situation about the criminal charges with Ms Yeo, updated her on charges being withdrawn and explained the remaining issues. I prefer Ms Yeo’s evidence that she was simply told that some charges had been dropped and was not given details of the remaining charges.

[10] On 18 March 2011 there was a discussion between Mr Burns and Ms Yeo. Mr Burns says that he told Ms Yeo that he had decided to plead guilty because he could no longer afford to defend the claims. Ms Yeo says that she was told that Mr Burns was struggling financially but was never told that he was going to plead guilty. She understood from that and the November discussion that Mr Burns was defending the charges. I prefer Ms Yeo’s evidence. In particular I note that Ms Yeo wrote to Mr Burns after their discussion on 18 March 2011 saying:

Dear Malcolm

Thank you for informing me of your upcoming court case which has now been confirmed for Thursday 24 March 2011. ...

As you know from the meeting I had with you and HR, and the discussions we have had previously, I have appreciated you disclosing that fact that there were charges

brought against. The decision was taken to continue with our offer of employment with the proviso that this may be reviewed with the outcome of the trial. This was considered the fairest approach especially given your assurances that you are innocent of the charges.

However, I do need to remind you that depending on the outcome of the court case we may need to meet to discuss a way forward. Should a guilty verdict be returned then this may have an impact on your ongoing employment with the DHB.

I wish you the best for the next week and your court case. ...

[11] The text of this letter is inconsistent with Mr Burns' evidence about having told Ms Yeo of a late decision to plead guilty. It is also inconsistent with Mr Burns' evidence that *If I had been made aware at that discussion that such a plea would affect my employment I might have decided differently*. Finally Mr Burns' evidence is inconsistent with what we now know of the progress of the criminal charges. As early as 28 September 2011 Mr Burns had admitted the three charges of using a document for pecuniary advantage. The dispute related to the police assertion for the purposes of sentencing on those charges that there had been no burglary. Mr Burns maintained that there had been a burglary. In other words, Mr Burns had not been protesting his innocence; he was just disputing the circumstances of his offending. That is apparent from the minute of Judge MacAskill provided as part of the Authority's investigation and a letter from Mr Burns' counsel provided during SDHB's investigation.

[12] On his guilty plea Mr Burns was convicted and sentenced to fines totalling \$1,500.00 on 24 March 2011.

Disciplinary Investigation

[13] Mr Burns told Ms Yeo about his conviction. Ms Yeo then wrote to Mr Burns on 30 March reminding him about the November 2010 discussion and her 18 March 2011 letter and requiring him to meet to discuss the impact on his employment *in light of the guilty verdict being returned*.

[14] Mr Burns attended the meeting on 31 March 2010 with his lawyer. Mr Burns' evidence is that he explained the outcome and background of the charges but it became clear to him that SDHB intended to dismiss him. To the extent this evidence is intended to suggest any pre-determination on Ms Yeo's part I reject it. Mr Burns provided a letter dated 28 March 2011 from counsel who had acted for him on the criminal matter. The letter explained that to prove ownership of items taken in a

burglary Mr Burns had altered three bank documents; that eventually the police accepted that there had been a burglary and that Mr Burns actually owned the items for which he had claimed insurance; and that due to mitigating circumstances and Mr Burns' previous good record he had been fined \$1,500.00. I accept Ms Yeo's evidence that she had not previously been told by Mr Burns about him altering bank records.

[15] Following this meeting Ms Yeo wrote to Mr Burns setting out her preliminary decision as follows:

As discussed we had considered all of the reasons and extenuating circumstances both you and your lawyer presented to us at the Thursday 31 March Meeting. However, as we relayed to you our preliminary decision is that your employment should be terminated based on the following reasons:

- a. You have been found guilty of a charge of using a document for pecuniary advantage. You have also admitted altering a bank document. This aspect was never made clear to us when you were offered employment.*
- b. You always protested your innocence of the charges and led us to believe this was the case.*
- c. The offer of employment was contingent on your having no police convictions, this is no longer the case. A conviction for fraud, especially in your role makes it virtually impossible to continue working in that role.*
- d. This has damaged the trust and confidence relationship we have with you as an employee. We do not believe there is any way you can reassure us of that trust and confidence on an ongoing basis.*

[16] Ms Yeo suggested another meeting to give Mr Burns an opportunity to make any further comment. They met on 8 April 2011. During that discussion reference was made to Mr Burns' low risk of reoffending and other aspects mentioned in the pre-sentence report prepared for sentencing on the criminal charges. It is common ground that Ms Yeo adjourned the meeting briefly to consider these matters. When she returned she confirmed that her decision was to dismiss Mr Burns.

[17] Later, Ms Yeo wrote to Mr Burns as follows:

As discussed we have considered in detail, all of the reasons and extenuating circumstances both you and your lawyer presented to us at the meetings of both 31 March and 8 April.

However, as we relayed to you at the meeting, my final decision is that your employment is terminated effective Friday 8 April 2011 based on the following reasons:

- a. You have pleaded guilty to a charge of using a document for pecuniary advantage, through altering a bank document in relation to your insurance claim. As discussed, although you were forthcoming about the charges laid by the police this aspect was never made clear to us when you were offered employment.*
- b. You always protested your innocence of the charges and led us to believe this was the case.*

- c. *You were aware from the outset that your ongoing employment was to be reviewed once the court had delivered its verdict and was conditional on the DHB receiving no adverse information in relation to your police check. A conviction for fraud, especially in your role as Supply Chain Improvement Leader makes it impossible in our view for you to continue working in that role.*
- d. *Your conviction has damaged the necessary and important relationship of trust and confidence we have with you as an employee, particularly given the assurances made by you that you were innocent of all the charges at the time of your offer yet you have subsequently acknowledged your actions in altering the bank document by pleading guilty. Although we have considered the statements relayed to us in the report of there being a low risk of reoffending and the suggestion of a “probationary period” we do not believe there is any way that you can reassure us so that we can have the necessary trust and confidence in you on an ongoing basis.*

Justification

[18] Whether SDHB’s decision is justifiable must be determined on an objective basis by considering whether SDHB’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[19] I am satisfied that SDHB sufficiently investigated matters before making its decision. What Mr Burns did not do was to provide a copy of Judge MacAskill’s minute, referred to above. He had agreed to do that during the November 2010 meeting but did not. SDHB could have followed up that failure by requesting it during the disciplinary meetings but no unfairness arose as a result of it not doing so. With that immaterial exception SDHB thoroughly investigated matters before dismissing Mr Burns.

[20] I am satisfied that SDHB raised its concerns with Mr Burns before dismissing him. That is apparent from the correspondence and is reinforced by the evidence of Ms Yeo and Mr O’Kane.

[21] I am satisfied that SDHB gave Mr Burns a reasonable opportunity to respond to its concerns before dismissing him. The sequence of events has been set out above.

[22] I am satisfied that Ms Yeo genuinely considered Mr Burns’ explanation before dismissing him. As noted I prefer her evidence on this point.

[23] This is not a case where the distinction between the actions a fair and reasonable employer would take and those a fair and reasonable employer could take is relevant. Mr Burns was convicted during his employment of three counts of the serious offence of using a document for pecuniary advantage. His job required him to have computer access to SDHB's procurement system. I am referred to *NZ Bank Officers IUOW v Databank Systems Ltd* [1984] ACJ 21 as an analogous case. I agree. There are also more recent analogous cases but it is not necessary to cite them.

[24] It is apparent from the pre-sentence report dated 23 September 2010 that Mr Burns knew then that a conviction could have negative consequences for future employment. He was subsequently employed by SDHB subject to express terms of employment about the potential consequences of a conviction. I do not accept Mr Burns' position that the conviction for pre-employment conduct was not relevant. All SDHB knew before he was employed was that he faced charges of which he said he was innocent. SDHB was prepared to accept that pending the outcome of the criminal charges. Twice before the criminal charges were actually disposed of Mr Burns was reminded about the consequences of a conviction. The pre-sentence report dated 21 March 2011 makes it clear that he knew then of the potential negative employment consequences from a conviction. When he was convicted SDHB raised and properly investigated its concerns with him. Ms Yeo considered the things said by Mr Burns by way of explanation but concluded that she could no longer have trust and confidence in him. That was the conclusion that any fair and reasonable employer could (and would) have reached.

Summary

[25] Mr Burns does not have a sustainable personal grievance.

[26] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.