

ATTENTION IS DRAWN TO AN ORDER
PROHIBITING PUBLICATION OF
PARTIES' IDENTIFICATION DETAILS

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 284
3102833

BETWEEN CC
 Applicant

AND DJ
 Respondent

Member of Authority: David G Beck

Representatives: Ella Smith, counsel for the Applicant
 Fiona McMillan, counsel for the Respondent

Investigation Meeting: 7 and 8 April 2021 in Dunedin

Submissions Received: 14 May and 1 June 2021 from the Applicant
 4 June and 25 June 2021 from the Respondent

Date of Determination: 5 July 2021

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act) the applicant applied for a permanent non-publication order that was not opposed by the respondent. Consensus aside, I need to be satisfied that a sound basis for the exercise of the

discretion the statute provides is apparent as non-publication departs from the important principle of open justice. I must be convinced of specific adverse consequences pertaining to the applicant that would allow me to depart from the open justice principle as the standard for such a departure is a high one.¹ In a recent Employment Court decision considering how the interest in open justice should be weighed the Court made an observation that:

The reality is that the routine online publication of decisions of the Employment Relations Authority and the Employment Court creates a search mechanism for those who wish to use it, for example, to screen applicants for employment. It has become increasingly well recognised that the spectre of publication puts many employees off pursuing their claims, which in turn raises important access to justice issues.²

[2] The above is one overall consideration I must have regard to as well as the specific circumstances of the applicant.

[3] In weighing the factors identified, I have resolved to not publish the parties names, some details and the location of the disputed grievance on the basis that the applicant has health issues and there are distinct features of this situation that warrant a degree of privacy being preserved. This order is made on a permanent basis.

[4] I use the following random identifiers for the people who gave evidence during the investigation meeting and the employer:

- CC – the applicant.
- BJ - a friend of the applicant
- XV – the applicant’s partner
- DJ - the respondent employer (the employer)
- RG – the respondent’s deputy CEO
- JD – the respondent’s general manager
- WG – the respondent’s HR administrator

¹ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

² *Chief of Defence Force v Darnley* [2021] NZEmpC 40 at [3].

- HZ – respondent’s service coordinator
- QT – respondent’s service coordinator

The employment relationship problem

[5] CC was employed by the employer as a full-time Community Support Worker in a care facility for vulnerable adults from 3 March 2020 until her summary dismissal on 21 April 2020 after her employer received a police vetting report that disclosed CC had previously been the subject of the Police Diversion Scheme.

[6] CC first raised a personal grievance by filing a statement of problem in the Authority on 5 May 2020, alleging that she had been unjustifiably dismissed. The employer filed a statement in reply asserting that the employment of CC ended due to a perception, based on a police vetting report, that she posed too great a risk to their vulnerable clients.

The Authority’s investigation

[7] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all details of the evidence and background circumstances. I have likewise carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant. I heard evidence at the investigation meeting from all parties randomly identified above.

Issues

The issues to be decided are:

- (a) Was CC unjustifiably dismissed – a question that has to include an assessment of whether the employer fairly considered the implications of CC’s police vetting report and then did they effect a dismissal in accord with s 103A of the Act and good faith factors.
- (b) If CC was unjustifiably dismissed, did she engage in conduct that would disentitle her to any remedies - if not and remedies are appropriate, what should they be and how is the issue of contributory conduct to be assessed.

- (c) An assessment of the level of costs if any, to be awarded to the successful party.

What caused the employment relationship problem?

[8] At the time CC applied for a position of community support worker in February 2020 she had taken a year off from extensive experience as a care/support worker in a variety of settings. An online job application form and declaration completed by CC contained a general question under the heading “criminal history” seeking disclosure of any convictions or “cases pending”. CC answered “no”. The form also had a declaration at the end of it where: CC affirmed that the answers and information provided (including a CV) were to the best of her knowledge “true and correct”. The form also stated:

I understand the provision of incorrect or misleading information may result in my summary dismissal. I understand if any false information is given or any material fact suppressed, I may be disqualified from consideration or, if appointed. I may be dismissed; and:

If I am employed before the results of my police check are supplied to [the employer] I understand that my employment may be terminated if the police check reveals information that [the employer] considers makes me unsuitable for the job or which contradicts statements I have made on my application.

[9] CC attended an interview in mid-February 2020 conducted by two of the employer’s service coordinators (HZ and QT). Both recalled CC interviewed well, they had no concerns at the time and recommended her for appointment to their line manager. HZ asked questions during the interview and QT took notes in a pre-prepared format. The notes record CC answered “no” to a question about “convictions” and the question: “Is there anything we need to know that might stop you from fulfilling this role?” had no recorded answer. The response to the latter question was an essential difference between the parties, with CC asserting that during the interview she discussed the fact she had been the subject of the Police Diversion Scheme in 2016 and the details of why. CC claimed HZ and QT assured her it was not an issue and suggested it probably would not show up in her police vet.

[10] By contrast, HZ and QT who were both experienced at interviewing, asserted strongly that CC did not detail the Police Diversion Scheme issue and had only answered “no” to the general question “was there anything the employer needed to know” before making an offer of employment. HZ and QT were adamant in their recall that the diversion matter was not discussed at the interview claiming if it had been, it is likely it would have been noted and

they both suggested that had it been raised, they would have had to discuss it with their line manager (JD) before deciding to recommend the appointment and that no reference to the diversion matter was contained in CC's subsequent appointment letter.

[11] I note however, that CC claimed she did highlight the issue of her having raised the diversion issue during her interview shortly after her dismissal in a telephone call to JD and; that he did not interview HZ and QT and put this to them at the time. CC also provided a text exchange of 24 April with a co-worker in which she impliedly referred to the diversion at interview by stating she had been "honest at the start and told them. (HZ) told me not to worry as it was four years ago". CC's advocate also included the claim of the interview disclosure being made in a 3 May 2020 Statement of Problem filed with the Authority.

[12] In the event, determining this issue was only part of the puzzle as the employer's predominant motive for dismissal appears to have been the perception, once they had obtained the detailed police vet, that CC posed a risk to their clients. HZ and QT took no part in the decision to dismiss.

Events leading up to the dismissal

[13] After the interview, a comprehensive three page letter of offer to CC was provided on 27 February 2020, it attached: a collective employment agreement; union contact details; reference to workplace policies (accessible via an internal website) and a detailed job description. The letter of offer detailed CC was to work at a facility housing 20 adults with intellectual disabilities alongside 18 other community support workers and she was to report directly to QT. The said letter also had a provision related to the police vet that read:

Your employment is also subject to a police check confirming that there is nothing known to the police which in our view would probably have influenced our decision to offer you employment. If you have already commenced employment and the police check is not satisfactory to [the employer], you will be advised promptly and your employment will terminate at the end of the notice period described in your employment agreement. You will be required not to work out the notice period.

[14] CC signed an acceptance of the above letter of offer's declaration at the letter's foot on 2 March 2020 and returned the completed letter of offer to the employer as well as opting to join the union and gain collective employment agreement coverage.

[15] CC commenced work on 3 March 2020 on a roster of four “awake night shifts” from 11pm to 7 am and by all accounts the employer had no issue with her work that entailed her being unsupervised with the safety and well-being of clients and being involved in administering medication.

[16] On her first working day, CC provided a signed consent form for police vetting that included a statement that the Police could release specific information relevant to the vetting request including:

- Charges that did not result in a conviction including those that were acquitted, discharged without conviction, diverted or withdrawn
- **Any** interaction I have had with New Zealand Police considered relevant to the role being vetted, including investigations that did not result in prosecution

[17] QT recalled providing CC’s vetting consent to the employer’s administrator on 16 March and it being returned by the Police on 17 April 2020.

The dismissal

[18] Upon receiving and reviewing the police vet, JD (General Manager) said he discussed the content of such with RG (Deputy CEO) and then WG (HR Administrator). From the evidence I heard, it emerged in brief that:

- no legal advice was sought;
- JD and RG had no previous experience in dealing with an issue involving diversion;
- WG called an absent senior co-worker for advice but she then deferred to RG, who had already advised JD to dismiss CC believing no process needed to be followed as it was in his view a ‘breach of contract’;
- no thought was given to allowing the opportunity for CC to explain the context of her obtaining diversion from the Police.

[19] RG appeared to be the overall decision-maker, although he claimed that he was only an ‘influencer’ and that the discretion to dismiss rested with JD as the general manager. JD suggested he alone made the decision and, he acknowledged he did not check an available

disciplinary policy, feeling entitled to deviate from it because he thought CC had engaged in “fraud and deception” and he viewed the offence for which diversion was granted as involving dishonesty. JD also claimed that he had discussed matters with both QT and HZ, over the prior weekend, concerning what was disclosed during the interview but he did not discuss specific issues concerning the disclosed police vetting report.

[20] It is to be noted that CC’s police vet did not disclose any previous criminal convictions or charges other than the matter being the subject of diversion.

[21] JD then called CC on the afternoon of 21 April and advised her he “was about to email her a letter terminating her employment due to an unsatisfactory Police check”. Both CC and JD’s recollection of this phone call differ but it was accepted by JD that he had resolved to dismiss CC and the call was to communicate such. JD did recall when communicating the decision to dismiss, CC indicating it was a ‘misunderstanding’ she could clear up but no further response was provided by CC.

[22] In answering questions during the investigation meeting, JD displayed a firm view on the futility of any issues CC could have raised as he had presumably pre-determined the dismissal prior to calling CC. I found that his evidence demonstrated that he had a ‘closed mind’ to any alternatives to dismissal including when asked did you consider CC’s personal circumstances he replied – “yes but I did not know her a lot”.

[23] I observe that the employer’s position is hampered by there being no contemporaneous notes covering the deliberations that led to the dismissal and JD’s telephone call. Matters were not assisted further by JD failing to promptly provide the dismissal letter by email to CC until 22 April. The letter, over JD’s signature dated 21 April, was drafted by RG and detailed: a summary of “concerns” including: the police vet (the actual police vet report was not disclosed); the declaratory provisions of the employer’s letter of offer; a view that CC had not disclosed her diversion during the appointment process and then it passively detailed the reason for dismissal as:

Therefore the disclosure on your Police Vetting Report that you were initially charged and later granted diversion for charges of a serious nature is in [the employer’s] view unsatisfactory. Had we known at the time of your interview of this offence, it is unlikely that we would have offered you employment.

[24] The letter ended by signalling it was a “notice of termination” and that a two weeks’ notice period would be paid in lieu and: “Your last official day is 21 April 2020 and your final pay will be processed on 29 April 2020”.

[25] During the investigation meeting, JD and WG gave differing reasons why they dismissed CC but it boiled down to an assessment that CC posed an unacceptable risk to vulnerable clients and they felt she had eschewed several opportunities to disclose she had been the subject of the Police diversion scheme before being employed and they viewed this as misleading and dishonest. However, none of these concerns were put to CC for comment.

[26] In addition, JD immediately disclosed to CC’s supervisor that CC had provided an unsatisfactory police vet (without disclosing specific details) and would not be returning to work. Consequently, the decision quickly got around the section of the workplace CC worked in. WG and JD were unrepentant on the disclosure and did not view it as a privacy breach and when pressed did not think any lesser obvious alternatives to protect CC’s privacy existed.

[27] JD indicated in a post-dismissal text to CC of 22 April, that: “All staff have been told is that a police check was returned unsatisfactory” and then he invited CC to elaborate to ex-colleagues if she wished to do so. JD’s text concluded: “The letter will stand unless we get information that wilm [sic] change this decision”. JD suggested he may have changed the dismissal decision but because CC did not get back to him with any further explanation he took this deliberation no further. CC promptly engaged an advocate and then filed an application with the Authority (on 5 May).

[28] In the event, CC later disclosed the circumstances of her leaving to a co-worker but I observe that this was understandable in order to dispel speculation on the employer’s earlier disclosure of an ‘unsatisfactory’ police vet.

[29] CC then appeared to have been concerned that the police should not have disclosed her diversion and she genuinely appeared surprised by this, despite having signed a consent form that allowed the police to do so and having been vetted by a previous employer and two prospective employers. CC discovered the validity of the police actions when they responded to her on 23 April setting out their approach to disclosure and that such was in line with what she had consented to. The Police noted that the same information had been released to three other entities (that were all social care providers).

Was the dismissal justified?

[30] The employer's counsel made a submission that this was a 'conditional' offer based on a satisfactory police vet as a prerequisite of ongoing employment and that CC had failed to fulfil the condition by not disclosing the diversion matter at her interview. Further, once the police vet was returned the employer's counsel claimed they had the discretionary right to effectively cancel the employment agreement without any further engagement with CC. Counsel also suggested that employer policies developed for misconduct or performance situations that provided for natural justice and procedural fairness did not apply in this context. Counsel also highlighted at some length, what they saw as a lack of CC's credibility in an email CC presented to the Authority from the police vetting service, concerning her queries about the vetting process that without a satisfactory explanation, appears to have been redacted to remove a section of the response not flattering to CC's case.

[31] Whilst I found the exchanges with the Police post dismissal, did not reflect well upon CC it was a matter that had little relevance to my overall consideration of the dismissal and the fairness or otherwise of such. This is because all the correspondence showed was CC querying the police why they had disclosed the diversion and any comment by the Police as to what an employer may take into account has no relevance to the statutory test I must apply. Counsel also suggested this matter should be dealt with in the context of any consideration of compensation for distress as CC was claiming the diversion was disclosed during her interview and that the later reliance by the employer on the diversion issue for her dismissal compounded her distress.

[32] I disagree with counsel's overall analysis as it is apparent that s 103A (Test of Justification) of the Act prevails as this was a dismissal. This key provision requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[33] In summary: by statute, a dismissal must be effected in a procedurally fair manner with good faith obligations also applying as set out in s 4 of the Act.

[34] Section 103A details factors that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner, these summarised are:

- (a) whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee?
- (b) did the employer raised the issues of concern with the employee prior to deciding to dismiss?
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns?; and
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss?; and
- (e) any other factor the Authority regards appropriate.

Applying factors identified by the Act

[35] I find that the employer gave insufficient attention to factors (a) to (d) but it is appropriate to first assess the reasonableness of why the employer felt that they could dispense with key procedural fairness factors.

[36] The employer is a relatively large, well established organisation with approximately 500 employees but they inexplicably took no legal advice on their approach to this dismissal despite RG and JD acknowledging that this was the first time they could recall dealing with the non-disclosure of a police diversion matter.

[37] The first question is: was the employer's view that prior disclosure of a diversion matter clearly communicated in pre-employment documentation and during the interview process as a pre-requisite to ongoing employment. This leads to the allied question of whether CC could reasonably be expected to disclose the police diversion matter prior to being employed.

[38] On the first issue, I do not consider the question was 'squarely' put to CC either in pre-employment documentation or during the interview stage – what was sought was

disclosure of convictions and/or pending charges. The general declaration of: did CC know of any matter she needed to disclose that would influence the employer in engaging her or not, was not sufficiently specific and I observe that the employer has since revised pre-employment documentation.

[39] CC appeared to perceive that her police diversion was a matter that would not be disclosed as the basis of the scheme is to allow largely first time offenders, engaged in low level offending, to accept responsibility for a wrongdoing without the consequence of a conviction impacting their ongoing lives. The scheme in short, allows the person to own up to an offence and then engage in rehabilitative community activity. However, CC failed to diligently appreciate that the vetting consent form, explicitly allowed the Police to disclose the diversion issue and it gave her prospective ongoing employer the ability to assess whether contextual factors made the vet unsatisfactory.

[40] On the latter, I record that although they took an avowedly conservative approach to the alleged offence identified it could not be said that the employer acted unreasonably *per-se* in deeming the charge, for which diversion was allowed and its context, to be at issue for their vulnerable clients.

[41] It is not my job to ‘step into the shoes’ of an employer, what I must do is objectively assess whether the decision to dismiss “fell within the range of what a fair and reasonable employer could have concluded in all of the circumstances at the time”.³

[42] In essence, due to the objectively reasonable nature of the concerns held by the employer, the dismissal decision was arguably an option available to the employer. The vetting report showed CC whilst being afforded diversion, still contested the offence (despite signing a Police Adult Diversion Scheme declaration stating “I accept responsibility of the offence(s)”). In the role CC was already engaged in, the nature of the offence was objectively and understandably relevant.

The legal position

[43] Aside from the statutory test of justification that I must apply, the legal position is lacking in significant jurisprudence and where there is case law it is predominantly concerned

³ *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [21].

with disclosure obligations of criminal convictions (*Hariwera v Presbyterian Support Services*)⁴ or pending charges (*Murray v A-G*).⁵ I could find no case that traversed the obligation to disclose prior police diversion or the assessment of diversion.

[44] The starting point, recently restated by the Employment Court in *Senate Investment Trust Through Crown Lease Trustees v Matthew Cooper* is “There is no proactive obligation on a prospective employee to disclose information of this nature unless asked to do so”.⁶

[45] I have found that here CC was not specifically asked to disclose any or all dealings with the Police so she did not mislead the employer at the interview stage. I also find the general ‘fishing’ query of placing CC on notice to disclose anything that might be relevant to the employer’s decision to employ did not lead to a ‘half-truth’ being communicated when she answered “no”.

[46] I was subsequently provided with CC’s police file that indicated that she had been vetted by previous entities and the diversion was disclosed (in those cases one employer did not dismiss her and I heard evidence at the investigation meeting from an employer who had no issue with CC whilst being aware of the diversion issue and this employment contextually involved a high degree of trust). To this extent, although under no ‘technical legal obligation’, CC could have potentially prevented her dismissal by open disclosure at some point, on a matter that was bound to come up. The tragedy of the situation for CC was that I was provided with medical evidence that, had it been available to the employer at the time they made the assessment of the police vet, could have objectively persuaded the employer to continue CC’s employment.

[47] The only case that assisted the employer is *Murray v AG* that, in an accepted somewhat unconventional approach, held in some limited circumstances where the specific context of the job required fuller disclosure of adverse previous issues, the Court can exercise its equity and good conscience jurisdiction and uphold a dismissal (here finding that two IRD employees’ failure to disclose pending benefit fraud charges was incompatible with their roles as tax investigators).⁷ The distinguishing feature in *Murray* that does not assist the employer

⁴ See for example *Harawira v Presbyterian Support Services* AEC 20A/94.

⁵ *Murray v Attorney-General* [2002] 1 ERNZ 184.

⁶ *Senate Investment Trust Through Crown Lease Trustees v Matthew Cooper* [2020] NZEmpC 45 at [56].

⁷ At [53] – [54].

however, was the dismissals described were effected in a procedurally fair manner and involved non-disclosure of pending charges. Here, CC's offending was historical and of a category of offending qualifying for police diversion.

A potential privacy breach?

[48] Whilst I have no jurisdiction to award damages for breach of privacy for deliberate disclosure of information around the dismissal I can take it into account as an aggravating factor in considering compensation for the distress caused by this breach and I note that the Privacy Commissioner has commented on this matter and accepted that humiliation is at issue in such circumstances. Personal information should not be disclosed for purposes other than those for which the information was obtained (Principle 11 of the Privacy Act 1993) and here it was.⁸

Procedural issues

[49] Notwithstanding my suggestion that CC's dismissal may have been substantively justified given that on the information available at the time CC may have objectively posed a risk to the employer's clients, I have to assess carefully whether the dismissal was enacted in a procedurally fair manner at the time. In this regard, the employer:

- did not identify their specific concerns or put them to CC for consideration;
- do not appear to have documented a fair investigation into what was said during the initial interview;
- conducted no disciplinary meeting and did not disclose the results of the police vet or the full correspondence for comment prior to dismissal;
- provided CC with no opportunity to get advice or indeed to provide an explanation of any mitigating factors prior to the employer issuing the decision to summarily dismiss her (I have discounted as an unsustainable premise the suggestion that CC had an opportunity for genuine feedback on the decision after it had been made and that a reconsideration of the decision may have been possible);

⁸ See discussion in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 and <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions-276280-2018-nzpriv-cmr-2-staff-told-of-employee-sacked-for-drug-use/> after the company revealed the reason why she was dismissed in an email sent to all employees.

- did not fairly consider CC's situation and properly assess the risk to clients that may have been manageable, in making the decision to dismiss; failed to seek legal advice and properly consider the purpose of the police diversion scheme and evidently failed to understand the contextual nature of the offence CC obtained diversion for (in this context I was struck by a revelation that the employer worked to retain employees with disclosed similar conviction issues and the stated ethos of the organisation is in part, to support rehabilitative solutions);
- was unclear and contradictory on the specific reasons for dismissal both in correspondence and during the investigation meeting;
- unnecessarily disclosed to co-workers the reason for CC's employment ending in a manner that engendered unnecessary speculation where other communication strategies were available;
- could have stepped back from the brink and immediately met with CC after she was dismissed to go over her mitigating factors (although I note CC failed to apprise them of such in a timely manner).

[50] At best, one could say that CC by her own actions, in not appreciating that the police vet would validly disclose her diversion and thus taking no steps to prepare her employer with an explanation, caused her own dismissal. I consider that is an overly harsh view of what occurred. I prefer an assessment that CC was an experienced care worker who had taken a break from employment to look after her children and her failure to be upfront was likely driven by a fear the diversion would be viewed as a matter that would prejudicially cause her to not be considered for appointment so she did not disclose it, perhaps wrongly thinking as her previous police vets had not led to any concerns, that the diversion had remained undisclosed by the police. An alternative scenario is two of the previous vets led to employment offers being withdrawn but I had insufficient evidence to conclude either of these premises.

[51] The employer in claiming that they were only being protective of their clients' safety, need to reflect on: unclear documentation; a failure to properly document interviews and their policy of engaging employees before a police vet is complete (including the fact that the

employer allowed CC to work three night shifts unsupervised after they received the police vet).

[52] This assessment has prevented me from an available alternative finding suggested by counsel that the defects in the process were minor and did not result in CC being treated unfairly. The multiple defects in process that I have identified and considered cumulatively are such that CC was denied a fair opportunity of establishing that she should not have been dismissed regardless of the content of her police vet. As the Employment Court in *Howard v Carter Holt Packaging Ltd* found: “The conclusion reached by the employer was not one which was open to a fair and reasonable employer, given the procedural defects”.⁹

Good faith

[53] I also find that the employer was in specific breach of s 4(1A)(c)(i) and (ii) of the Act that requires that an employer must provide an employee with information where they are “proposing to make a decision that will, or is likely to have an adverse effect on the continuation of employment” and more pertinently “an opportunity to comment on the information to their employer before the decision is made”.¹⁰ This well-established good faith obligation reinforces s 103A(3)(b) and (c) of the Act that codifies basic procedural fairness considerations that I must apply, including:

whether, the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and whether the employer gave the employee *a reasonable opportunity* to respond to the employer’s concerns before dismissing or taking action against the employee.¹¹

Breach of own policy

[54] The employer moving immediately to a summary dismissal on receipt of the police vet leads to a reasonable conclusion that the dismissal was pre-determined which significantly breached the employer’s disclosed “Staff - Misconduct - Policy” and obligations under s 103A of the Act to consider other contextual matters such as CC’s physical and mental health at the time of the alleged offence and other potentially mitigating factors such as CC’s

⁹ *Howard v Carter Holt Packaging Ltd* [2014] NZEmpC, (2014) 12 NZELR 34 at [98].

¹⁰ Section 4(1A)(c) Employment Relations Act 2000.

¹¹ Section 103A(3) Employment Relations Act 2000.

subsequent positive references and performance once she commenced work - albeit over a short period of time.

[55] As discussed, I have not gone as far to conclude the dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances but I do find that a fair and reasonable employer could have approached this differently and paused to consider wider factors or alternatives, before making the decision to dismiss. The employer's initial albeit uninformed view, that the results of the police vet were concerning was however, understandable.

[56] Whilst not necessarily excusing CC's lack of full and timely disclosure to her employer, CC was entitled to be treated fairly in terms of s 103A and good faith obligations set out in the Act.

[57] Further, I have found the defects in process were not minor as envisaged in s 103A(5)¹² of the Act and they did result in CC being treated unfairly. I cannot absolve the employer from a poorly conducted dismissal.

Finding

[58] I find in a somewhat unusual context, that the summary dismissal of CC may have been substantively justified but procedurally unfair to a significant extent. This finding is despite the fact that CC was made explicitly aware of the importance of a satisfactory police check prior to being employed and she should objectively have known that the diversion issue would be disclosed. The employer acted reasonably in assessing the risk to their clients of CC's continued employment on the limited information available to them at the time but fatally failed to inquire further of contextual issues that objectively could have led to ongoing employment.

[59] On balance, I was not convinced by a submission that CC had brought the diversion matter to the employer's attention at her interview or her oral evidence that she knew the diversion matter would come up. The employer's interviewers gave credible evidence that CC had not mentioned the diversion during her interview.

¹² Section 103A(5)The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

[60] However, taken together with the significant and multiple procedural defects in this dismissal, I find the dismissal was unjustified. The employer's counsel made an observation that had the disclosure been made in a timely fashion then either no position would have been offered or the employer would have had "an opportunity to obtain relevant information and make an informed decision". The counter to this observation is had the employer allowed CC an input into the decision to dismiss then that relevant and contextual information would have been available to inform the decision to dismiss.

[61] Whilst this concept may appear frankly odd, the notion of a dismissal being potentially substantially justified but procedurally unfair and therefore overall being unjustified is well established having been identified by the Court of Appeal over three decades ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW*. A judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer's right but "unjustifiable" by virtue of the way in which the matter was handled and in breach of good faith obligations.¹³

Conclusion

[62] Having made a finding of unjustified dismissal involving breaches of good faith obligations, CC is entitled to a consideration of remedies.

Remedies

Lost wages

[63] Section 123 of the Act provides for the reimbursement of the whole or any part of wages or benefit lost by CC should I find that she has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[64] Here I find the loss of remuneration was attributed to the personal grievance as CC was deprived of any input into the decision to dismiss and had she been given that opportunity the decision may reasonably have been a different one. CC claimed nine weeks and one day

¹³ *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* (1985) ERNZ Sel Cas 142; [1982] ACJ 663 (CA).

of lost remuneration and holiday pay accrued on such sum before she found alternative employment and she provided evidence of multiple job applications and wage records.

[65] Given no performance issues were extant, I find that CC's claims are made out and I award her lost wages for the nine weeks and one day claimed in the amount of \$8,464 (gross) under s 123(1)(b) of the Act and holiday pay that would have accrued for this period in the amount of \$677.12 (gross) under s 123(1)(c)(ii) of the Act. I record I have considered whether the lost wages award should only have extended to a period spanning the time a fair process would have taken but rejected that approach as unusually this case does not involve misconduct 'on the job' and applying a counterfactual approach (as the Court of Appeal used in *Waitakere Council v Ioane*)¹⁴ had a fair process been run and CC's personal circumstances been taken into account when assessing the diversion issue, it is not unlikely that the dismissal decision would not have proceeded.

Compensation for hurt and humiliation

[66] CC gave evidence of the impact of the summary dismissal and the uncertainty it created at a difficult time to find immediate alternative employment and the impact this had on her mental well-being, sleeping patterns, family relationships and self-confidence. The impact on CC was described by a close friend (BJ) and her partner (XV) and it was compelling with them describing CC becoming withdrawn when she previously had a happy carefree approach to life, frequently tearful and feeling a sense of guilt in not being able to provide for her family of three boys and work in an area she loved. A GP certificate indicated that CC suffered depression that was "compounded by her losing her job".

[67] I am convinced that at the time, CC suffered humiliation, loss of dignity and injury to feelings due to her former employer failing to allow her any input into the decision to dismiss and adequately explain the reasons for her dismissal. Unnecessary distress and embarrassment was also caused by the dissemination of too much information to co-workers on the reason for her dismissal for which she had to correct by disclosing more widely the circumstance of her police diversion which was not information for public consumption.

¹⁴ *Waitakere Council v Ioane* [2004] 2 ERNZ 194 (CA) at [81].

[68] I have also considered whether CC's belief that she had disclosed the diversion during the interview and been assured it was not at issue caused her additional distress but given my findings I have discounted this as a contributing factor.

[69] Counsel for the employer suggested no remedy should be granted on the grounds that CC had engaged in egregious conduct but I do not consider such is made out to reach the standard or threshold alluded to in *Xtreme Dining Ltd v Dewar* as this would have to involve something akin to "disgraceful conduct"¹⁵ where it would not be equitable to make any award. For the reasons discussed I have found no legal obligation of disclosure existed and I have had no other conduct identified during the employment relationship that could reasonably be considered egregiously deficient.

[70] Taking into account the circumstances and awards made by the Authority and Court and being guided by the Employment Court decision of *Roach v Nazareth Care Charitable Trust Board* that extensively traversed applicable case law in applying s 123 and s 128 of the Act,¹⁶ I consider CC's evidence warrants a reasonably significant level of compensation that I set at \$18,000 under s 123(1)(c)(i) of the Act.

Contribution

[71] Section 124 of the Act states that I must consider the extent to what, if any, CC's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹⁷.

[72] I have not found that CC engaged in actively misleading her employer and no misconduct was evident here but I have found that CC could have better appreciated the signals sent in pre-employment documentation and better understood the explicit wording of the police vet consent. As a result, CC could have been more open about the police diversion and 'front footed' the issue. CC could have sought and disclosed mitigating information at the point she was offered the job or shortly after being appointed as she had gone through a vetting process with three previous employers. It was inexplicable that CC was surprised by

¹⁵ *Xtreme Dining v Dewar* [2016] NZEmpC 136 at [207]

¹⁶ *Roach v Nazareth Care Charitable Trust Board* [2108] ERNZ at [68] – [80].

¹⁷ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

the Police disclosing the same information but that may have been because the previous employers did not put any concerns on the vet to CC.

[73] The employer's counsel suggested a significant reduction should flow from culpable and blameworthy conduct for not disclosing the charges that led to CC's diversion. Again as discussed above, I have not found a legal duty to disclose existed and I am not drawn to cases cited by counsel where the non-disclosure of much more serious matters was at issue.

[74] In this unusual context, I find CC contributed to the situation giving rise to the personal grievance but I have balanced this up with my finding that the employer's approach to the dismissal was procedurally deficient. CC cannot be blamed for the deficiencies in process that robbed her of any input on the decision to dismiss her.

[75] On balance, I find a 15% reduction in CC's remedy for compensation but not on lost wages is warranted.

Summary

[76] **I have found that:**

- (a) CC was unjustifiably dismissed by the manner in which her employment with the employer was terminated.**
- (b) The employer failed to adhere to good faith obligations in effecting the dismissal.**
- (c) The employer must pay CC the sums below:**
 - (i) \$15,300 compensation pursuant to s 123(1)(c)(i) Employment Relations Act 2000 without deduction**
 - (ii) \$8,464 (gross) lost wages pursuant to s 123(1)(b) Employment Relations Act 2000**
 - (iii) \$677.12 (gross) holiday pay as a lost benefit pursuant to s 123(1)(c)(ii) Employment Relations Act 2000.**

Costs

[77] Costs are at the discretion of the Authority and here CC was successful in her personal grievance claim and has succeeded in obtaining significant compensatory remedies in an investigation meeting that took a day and a half.

[78] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that compelling circumstances exist to depart from the normal application of scale costs.

[79] I note that CC was represented by a Community Law Centre counsel but I do not see that as preventing me considering a costs application from counsel on the basis that I can exercise a wide discretion under cl 15 Schedule 2 of the Act and the Court and Authority has elsewhere upheld this contextual approach.¹⁸

[80] If no agreement on costs is achieved a costs submission from CC should be lodged within 14 days of the date of this determination and the employer will have a further 14 days to respond.

David Beck
Member of the Employment Relations Authority

¹⁸ See Member Dallas' discussion of why a community law centre, for public interest reasons, may be granted a contribution to costs of representation in *Celia Popkin v Innovative Landscapes Limited* [2020] NZERA 374, an approach upheld by the Employment Court in *Innovative Landscapes (20150 v Popkin* [2020] NZEmpC 96, [2020] ERNZ 262 at [21]-[22].