

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 426
5383792

BETWEEN SIMON COOK
 Applicant

A N D ALLIED INVESTMENTS
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rowland Ingram, Advocate for Applicant
 Chris McDowall, Advocate for Respondent

Investigation Meeting: 26 September 2012 at Manukau

Date of Determination: 28 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Cook) alleges that he was unjustifiably dismissed from his employment by the respondent (Allied). Allied denies that the dismissal was unjustified.

[2] Mr Cook was employed by Allied as a security officer in March 2012. An employment agreement between the parties was signed by Mr Cook on 12 March 2012 and he attended an induction on 16 March 2012 and a training day on 18 March 2012. His first work shift was Thursday, 22 March 2012.

[3] As part of the recruitment process adopted by Allied, Mr Cook was required to complete an application form for employment which, amongst other things, required that he disclose “*any physical, medical, or other condition which may affect how you do the job you have applied for*”, and further, candidates were asked specifically if

they had any of a number of medical conditions including “*nervous disorder/ anxiety*”.

[4] A further question was in the following terms:

State any other injury or illness that you have suffered that may affect your ability to perform tasks and discharge the responsibilities of the position applied for.

[5] Then, applicants were asked if they would agree to provide a copy of recent medical history from a general practitioner or other medical professional. Finally, at the point in the document where the applicant signed it, there was a warranty that the applicant had provided truthful answers.

[6] Mr Cook denied having any relevant physical, medical or other condition, denied having any of the listed conditions, did not disclose any other illness or injury that might be relevant to the job he applied for, but did consent to the provision of his recent medical history. He executed the document as required, adjacent to the warranty just referred to.

[7] On Thursday, 22 March 2012, Mr John Andrell, Allied’s supervisor of Mr Cook, received a telephone call from Mr Cook at approximately 3am on Friday, 23 March 2012, in which Mr Cook, allegedly in a highly agitated state, indicated that he was not able to attend at work later that morning. Mr Andrell described Mr Cook’s demeanour during that telephone call as “*hysterical*” and said that Mr Cook was “*beside himself*”.

[8] Mr Cook attended at the workplace later on 23 March with a certificate from the Auckland Mental Health Crisis Team indicating that he was not fit to return to work for three days. Mr Andrell referred the matter to Mr McDowall, the operations manager for Allied. Mr McDowall eventually contacted Mr Cook by telephone and amongst other things made it clear that Allied was concerned about Mr Cook’s failure to disclose his medical condition prior to engagement. Although this is disputed by Mr Cook, Mr McDowall is adamant that he proposed a meeting between the parties to discuss matters and Mr McDowall indicated that as a consequence of Mr Cook’s apparent failure to disclose relevant matters prior to employment, the employment relationship might be terminated. That contention also is disputed by Mr Cook.

[9] In any event, it is common ground that Mr McDowall telephoned Mr Cook on Sunday, 25 March 2012 and indicated to him that his employment was terminated and subsequently confirmed the termination by an email received by Mr Cook on the same date.

Issues

[10] Allied dismissed Mr Cook in reliance on Mr Cook's failure to disclose information Allied considered was relevant to the employment and in effecting the dismissal, Allied used, a so-called "*90 day trial period*" provision.

[11] It will be convenient if the Authority addresses the following issues then:

- (a) Whether the 90 day trial period complies with the relevant law; and
- (b) Whether Mr Cook fulfilled his obligations in the pre-employment documentation.
- (c) Was there an unjustified dismissal?

Does the trial period comply with the law?

[12] The Authority concludes that the trial period does not comply with the law. Section 67A of the Employment Relations Act 2000 (the Act) deals with trial periods for 90 days or less. The provision requires that the trial period be in writing. Clause 28 of the operative employment agreement sets out the provision in writing.

[13] The provision must be in the employment agreement. Clause 28 is contained within the employment agreement which was signed by both parties on 12 March 2012.

[14] The trial provision must specify a period (not exceeding 90 days) starting at the beginning of the employee's employment. Here, the employment agreement was signed on 12 March 2012 and by common consent Mr Cook had an induction on 16 March 2012, a training day on 18 March 2012 and worked his first shift on 22 March 2012. His dismissal in reliance on this provision took place on 25 March 2012. That date of dismissal is within 90 days of both the execution date of the employment agreement and the commencement of the provision of physical work and as a consequence that part of s.67A is also satisfied.

[15] However, the final requirement of s.67A is not included within the terms of the contractual provision. Section 67A makes clear that the third requirement is that the relevant provision make plain that the effect of the trial period is to abrogate the usual right to personal grievance. The failure of clause 28 to specify that personal grievance rights do not exist when that provision is relied upon, is fatal to the employer's reliance on the 90 day trial period.

[16] Allied needs to be very clear that it cannot rely on this provision in its employment agreement unless and until it is redrafted to comply with the law. The provision must be explicit that where there is a trial period and a dismissal within that trial period, then the employee is not entitled to bring personal grievance proceedings. The failure to make that clear in clause 28 makes clause 28 ineffective.

[17] This conclusion is further supported by the failure in the rest of the employment agreement to differentiate between normal personal grievance rights for "*ordinary*" dismissals and personal grievance rights (or more accurately the lack of them) where the trial period is relied upon.

[18] It follows from the foregoing analysis that Allied cannot rely on the trial period to defeat Mr Cook's claim.

Has Mr Cook properly disclosed his circumstances pre-employment?

[19] There is no question that Mr Cook failed to disclose to Allied prior to the employment commencing that he suffered from a relevant illness. Mr Cook said that he was under no obligation to do so (relying on the Human Rights Act in particular) and in any event, had he done so, he would not have been employed.

[20] Mr Cook also alleges that the nature of the application form he completed for Allied breached the requirements of the Privacy Act as well.

[21] Allied, for its part, says that Mr Cook's medical condition was absolutely relevant to the employment, both in terms of Mr Cook's own safety in the workplace and in terms of the safety of other employees, to say nothing of Allied's obligation to its client. Allied denies its documentation breaches either the Human Rights Act or the Privacy Act.

[22] In *Imperial Enterprises Ltd v. Attwood* [2002] 2 ERNZ 740, the Employment Court considered a case on somewhat similar facts to the present case. While discrimination by an employer against an employee is, on its face, illegal, the question of whether pre-employment information on medical conditions was directly relevant to the nature of the employment will go a long way to establishing whether the collection of that information is discriminatory or not. Section 23 of the Human Rights Act 1993 (the 1993 Act) establishes that the unlawfulness of an employer's inquiry will be made out if the inquiry could be reasonably understood to evidence an intention to discriminate.

[23] In *Atwood*, Judge Shaw identified that the generality of the inquiry by the employer would give a lead to the likelihood of that inquiry being found to be discriminatory or not and in principle, the more general the inquiry the more likely it was that the inquiry would "*reasonably be understood*" to be discriminatory.

[24] In the present case, the wording of the relevant provisions in the application form supplied by Allied is certainly general. In effect, it invites applicants to disclose medical conditions that are listed, then provides a further opportunity for applicants to identify conditions that are not listed or to identify any other matter that might limit the applicant's ability to do the job required.

[25] In the 1993 Act, s.21 identifies the prohibited grounds of discrimination and amongst other things includes psychiatric illness as a specific ground of disability. Discrimination on the grounds of psychiatric illness therefore is, in principle, illegal. Section 22 of the 1993 Act deals specifically with discrimination in employment. The section provides a broad prescriptive protection by providing that it is unlawful to discriminate against an applicant for employment who is qualified for employment just because that person has a psychiatric illness. Further, the termination of the employment of such an employee would also be prohibited.

[26] However, s.29 of the 1993 Act provides a broad exception to the general standard set out in s.22. What s.29 provides is that "*different treatment*" by reason of disability is not illegal if "*the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others ... and it is not reasonable to take that risk*".

[27] Allied's evidence is that Mr Andrell went through a stock standard interview with Mr Cook in which he, amongst other things, pointed out in detail to Mr Cook the nature and extent of the duties required of him. Mr Andrell, in his evidence to the Authority, made particular mention of the fact that the position Mr Cook was applying for was one as a solo guard at a multi-million dollar facility which, amongst other things, operated with the use of highly dangerous chemicals.

[28] Mr Andrell told the Authority that he went through each question on the application form with Mr Cook and that the process that he used was the same process that he had used with everybody. He told the Authority that he had interviewed hundreds of people in his 19 years on the job and thought that he was an experienced interviewer as a consequence.

[29] Mr Andrell told the Authority that he provided Mr Cook with a hard copy of the site job description and a copy of Allied's security manual.

[30] Mr Cook denied receiving a copy of the job description but given that it was Mr Andrell's evidence that he followed exactly the same process in his interview with Mr Cook as he did with every other employee or potential employee and that he had been doing the years for nearly two decades, it seems inconceivable that Mr Andrell would have failed to provide Mr Cook with that piece of information. The Authority specifically rejects Mr Cook's contention that Mr Andrell's evidence is to be treated with suspicion; it is true that Mr Andrell's brief of evidence proceeds on a mistaken basis as to the dates of the significant events, but he freely admitted that his information in that regard was mistaken and that the dates in Mr Cook's brief of evidence were the correct ones.

[31] Even if Mr Cook's recollection of the events is to be preferred and he did not receive a copy of the job description for the particular site, it is inconceivable that he did not have a very clear understanding of the obligations placed on him by the employment. Even if it were the case that he was unclear about the extent of those obligations when he signed the application form on 8 March 2012 (and the Authority prefers the view that he was given a site job description on that occasion and knew perfectly well what was required of him), at the latest on 22 March 2012 after he had completed an induction on 16 March and a training day on 18 March, Mr Cook would have been very clear about the nature of his responsibilities.

[32] Despite that, Mr Cook took no steps at any point to advise the employer that he suffered from two medical conditions which might have impacted on his ability to perform the role. Mr Cook made the decision not to disclose his medical condition during the application process, and relied on his understanding of the 1993 Act as prohibiting discrimination on the grounds of mental illness. But the Authority is satisfied that that prohibition is subject to limitations and in particular the limitation provided in s.29(1)(b) of the 1993 Act. On its face, the role required of a solo security guard in a large industrial enterprise which operates with hazardous chemicals is a role where either because of *“the environment in which the duties of the position are to be performed”* or *“the nature of those duties”* is such that *“the person could perform those duties with a risk of harm to that person or to others ... and it is not reasonable to take that risk”*.

[33] In the Authority’s view, Allied has obligations under the Health and Safety in Employment Act which requires it to protect its employee (Mr Cook) from serious harm and that duty cannot be discharged if Allied is blissfully unaware that Mr Cook suffers from two ailments which might make him vulnerable in such an environment. This is not the situation in *Atwood* where Ms Atwood was employed as a counter salesperson and had two undisclosed ailments, one of which might have had an effect on her timekeeping. In Mr Cook’s case, the nature of the ailments that he suffers from could potentially place him personally at risk in the workplace, and it seems to the Authority fatal to Mr Cook’s claim that he chose to keep the nature of those conditions from the employer thereby ensuring that it was completely unaware of his health status and therefore unable to make informed judgements about the propriety or otherwise of having him in sole charge of a large factory using dangerous chemicals in the dead of night.

[34] Despite the infelicities in the drafting of the relevant provisions in the application form, the Authority is absolutely satisfied that Allied has an obligation to acquire information about potential applicants which can assist it to make informed judgments about those applicants’ placement and thus protect those applicants from harm or serious harm in the workplace.

[35] Furthermore, Mr Cook, like Allied, has an obligation of good faith. It is not acting in good faith for an employee who knows information about their own circumstances which they ought to realise is relevant to the nature of the employment,

to withhold that information from the employer. Mr Cook told the Authority in answer to a direct question that the reason he did not provide Allied with the information it sought about his health status was because he thought he would not get the job if he was truthful. That may well be right, but there is no evidence that Allied would have precluded Mr Cook from any employment, but only from the particular job that he ended up filling. The evidence the Authority heard suggested that Allied had a number of different roles available from time to time and that not all of them would have been unsuitable for somebody with Mr Cook's health issues. Mr Cook presented to the Authority as an intelligent and presentable young man with a background in the security industry and a clean Police record. In many ways, he is, or would be, an ideal applicant, but his failure to disclose information which he ought to have known was relevant to a sole charge role in a potentially dangerous environment placed him at risk, potentially his employer at risk and, in the Authority's opinion, failed absolutely to meet the obligations of good faith imposed on both parties by the Act.

[36] Finally, Mr Cook draws attention to the deficiencies in the Allied application form concerning the requirements of the Privacy Act. He is quite right about those concerns, but nothing turns on that fact. As the Authority has already noted, the drafting of the application form is far from ideal and Allied would be well advised to have the application form redrafted with proper legal or employment advice before continuing to use the document. Generally, the privacy principles in the Privacy Act are not actionable; in any event, they are outside the Authority's remit.

Was Mr Cook unjustifiably dismissed?

[37] The Authority is satisfied that Mr Cook was unjustifiably dismissed. This is not because it is not available to the employer to rely on Mr Cook's failure to disclose relevant particulars in relation to his health; the Authority is satisfied that Allied can rely on that failure.

[38] The dismissal is unjustified in the Authority's view because a good and fair employer could not reach a decision to dismiss even in the circumstances of this case, without giving the employee a proper opportunity to be heard and there is no evidence at all that that opportunity was provided.

[39] There is even dispute as to whether that prospect was offered; Mr McDowall is adamant that in the discussion he had with Mr Cook on 23 March 2012, Mr Cook was given the opportunity of coming in and discussing matters the following day (a Saturday), but Mr Cook denies that that offer was ever made. Whether it was or was not, the fact remains that there was no meeting between the parties and Mr Cook was summarily dismissed two days later on 25 March 2012 without ever having had the opportunity of defending the allegations against him.

[40] What is more, Mr Cook had filed a medical certificate which put him off work until 28 March 2012 but notwithstanding that, Mr McDowall contacted Mr Cook by telephone while the latter was on sick leave, and sought to discuss matters with Mr Cook.

[41] On Mr McDowall's evidence, that conversation did not go well and Mr McDowall says that Mr Cook was aggressive, abusive and threatening. Even if all of that is true, the fact remains that the call should not have been initiated by a good and fair employer when an employee was on sick leave, even if the sick leave came as something of a bolt out of the blue to the employer, because of course it had no knowledge of Mr Cook's underlying ill health.

[42] Accordingly, the Authority is satisfied that Mr Cook was unjustifiably dismissed because the employer failed to wait until the end of his certified sick leave before contacting him, and failed to give him a proper opportunity to be heard, face-to-face.

Determination

[43] The Authority has found that Mr Cook has a personal grievance by reason of having been unjustifiably dismissed. However, the question of contribution arises. The Authority is required by s.124 of the Act to consider whether the circumstances that gave rise to the dismissal were contributed to in any way by the employee and if that question is answered in the affirmative, then the Authority must rebate the remedies available to the employee as a consequence.

[44] The Authority has reluctantly reached the conclusion that Mr Cook is entirely responsible for the circumstances giving rise to his personal grievance and as a consequence he is not entitled to any remedies at all. Had Mr Cook done what he ought to have done and told the employer about his health issues, the employer might

not have placed him in this particular role but might well have been interested in employing him in another role where he was less exposed and less vulnerable. As it was, the Authority is satisfied that Mr Cook was entirely the architect of his own misfortunes. His failure goes to the root of the bargain between the parties, for reasons the Authority has already enunciated.

[45] It follows from the foregoing that Mr Cook has satisfied the Authority that he has a personal grievance because Allied has failed to meet the test of justification for its actions as that test is set out in s.103A of the Act, but by reason of Mr Cook's contribution to the circumstances giving rise to his grievance, and the Authority's finding that that amounts to 100%, Mr Cook is not entitled to any remedies.

Costs

[46] Costs are reserved.

James Crichton
Member of the Employment Relations Authority