IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 494
5462436

	BETWEEN	WILLIAM HART Applicant
	AND	PRINTLOUNGE LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Greening and Nathan Tetzlaff for the Applicant John Armstrong for the Respondent
Investigation Meeting:	22 September 2014
Determination:	3 December 2014

DETERMINATION OF THE AUTHORITY

A. Printlounge Limited failed to carry out its dismissal of William Hart fairly but Mr Hart's conduct in misrepresenting his previous criminal history contributed to the situation giving rise to his grievance to such an extent that any remedies otherwise due to him are reduced by 100 per cent.

B. Mr Hart was entitled to one week's notice, paid in lieu, when his employment agreement was cancelled.

C. Costs are reserved.

Employment relationship problem

[1] Stephen Sheppard, the general manager of Printlounge Limited (Printlounge) dismissed William Hart on 24 February 2014 after Mr Hart had worked for seven weeks at the company's print business located in Browns Bay, Auckland. Mr

Sheppard did so after finding out Mr Hart had murdered a woman in Browns Bay thirty some years earlier.

[2] During a job interview with Mr Sheppard in early January Mr Hart volunteered the information that he had recently served two years in prison after a conviction for assault in 2011. Mr Hart went into some detail about events that led up to him assaulting a man at a party.

[3] The two men disagreed in their evidence on whether Mr Sheppard had then asked if Mr Hart had any other convictions and whether Mr Hart had answered that he did not. Mr Sheppard said he did ask the question about other convictions and Mr Hart did say 'no'. Mr Hart denied the question was even asked, so he said he could not have answered 'no' to it.

[4] They both agreed that, during the job interview conversation, Mr Sheppard had also mentioned a family member who had got a 'second chance' through getting a job after serving a prison sentence. Mr Sheppard said he would like to give Mr Hart that sort of opportunity but would need to consider what Mr Hart had told him over the weekend. Following the weekend Mr Sheppard contacted Mr Hart and offered him a job that he started on 8 January 2014.

[5] Unknown to Mr Sheppard at the time of making the job offer, Mr Hart had a more extensive criminal record. In addition to the two year prison term he disclosed serving from 2011 to 2013, Mr Hart had also served seven years in prison from 1986 to 1993, after a conviction for murder, and a further two year sentence between 1998 and 2000, after conviction on robbery-related assault charges. His Ministry of Justice criminal convictions report, obtained for the purposes of the Authority investigation, also disclosed Mr Hart's 2011 prison sentence was for three assault charges, not one, and that he was convicted for nine other offences in the period from 1978 to 1998 (mostly resulting in fines).

[6] Mr Hart had worked in a number of printing businesses previously and during February 2014 Mr Sheppard received a phone call from someone he knew in the printing industry who asked if Mr Sheppard was aware that Mr Hart had a conviction for murder.

[7] Mr Sheppard discussed the phone call with his wife, Tracey Sheppard, who was also a director of the company and worked in the business. Mrs Sheppard then did some research at the Takapuna Library. She found an article published in 1985 by *Metro* magazine about the murder by Mr Hart, then aged 23, of a North Shore woman, Janet Reygate. Ms Reygate's body was found on the beach in Browns Bay.

[8] On 24 February Mr Sheppard called Mr Hart to his office, said he had heard Mr Hart had a conviction for murder and asked if it was true. Mr Hart said it was true. There was a further conflict in their evidence about what was said then. Mr Sheppard said he had asked why Mr Hart had not told him of that conviction when the question was put to him at the job interview in January. He said Mr Hart replied that Mr Sheppard would not have employed him if he told the truth. However Mr Hart denied making that comment. The two men agreed that Mr Sheppard had then told Mr Hart he could not continue to work for the business and Mr Hart had left the premises immediately.

[9] Mr Hart raised a personal grievance about the termination of his employment. The matter was not resolved in mediation and proceeded to investigation. During the Authority's investigation of Mr Hart's grievance, a wage arrears issue was identified so that has been addressed in this determination.

Investigation and issues

[10] For the Authority's investigation Mr Sheppard and Mr Hart lodged written witness statements. Under oath or affirmation they both answered questions at the investigation meeting from me and the parties' representatives. The representatives also provided closing submissions on the facts and law.

[11] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[12] Determination of the following questions was necessary:

A. Did Mr Sheppard ask Mr Hart at the January job interview about other convictions and did Mr Hart reply 'no'?

B. Did Mr Hart say in their 24 February meeting that he did not tell Mr Sheppard about his other convictions because he would not have been employed if he had done so?

C. Dependent on those factual findings, was Mr Sheppard entitled to effectively 'cancel' Mr Hart's employment agreement for misrepresentation during the job interview?

D. Did Mr Sheppard's actions in ending Mr Hart's employment with Printlounge meet the requirements of the statutory test of justification under s103A of the Act?

E. Should remedies for lost wages and distress be awarded and, if so, should those remedies be reduced for conduct by Mr Hart that contributed, in a blameworthy way, to the situation giving rise to his grievance?

F. Was Mr Hart entitled to a further day's pay or payment of one week's notice that should have been paid when his employment was terminated?

G. Should either party contribute to the costs of representation of the other party?

A. What was said in the January interview?

[13] Matters in the Authority are determined not on the standard of proof beyond reasonable doubt (used in the criminal courts) but rather to the civil level of the balance of probabilities – that is not what certainly or definitely happened but what was more likely than not to have happened.

[14] Evidence from witnesses and documents (particularly those created at or around the relevant times) are considered carefully in making that assessment of probabilities. Consideration of that evidence may include questions of credibility, consistency and the degree to which what witnesses say is or is not corroborated by the accounts of others.

[15] In this case there were no notes or other documents recording what Mr Sheppard and Mr Hart said in their discussions in early January and on 24 February. Instead I have had to assess which was the more probable between their two partly conflicting accounts of their conversations. In doing so I bore in mind that neither man had any specialist knowledge of employment law matters and I took account of

what the Employment Court has called 'the natural human frailties' of witnesses attempting to recall conversations and events that occurred months earlier.[1]

[16] From those deliberations I concluded Mr Sheppard's recall was more likely than not to be correct.

[17] When Mr Hart revealed, without prompting, during his January interview that he had recently served a two-year prison sentence, it was more probable than not that a potential employer, in Mr Sheppard's shoes, would have asked whether Mr Hart had any other convictions. It was, as Printlounge submitted, a natural question to ask and would flow from a disclosure of that kind.

[18] As a former prisoner Mr Hart faced considerable difficulty in finding employment. In those circumstances answering 'no' would also have seemed the most practical or necessary course of action if he was to have a reasonable chance of securing a job that his other evidence confirmed he badly needed and wanted. In his oral evidence Mr Hart said he had only told Mr Sheppard about his two year prison sentence starting in 2011 in order to explain the gap in his recent employment history. His difficult employment prospects were a strong motivation to say 'no' to Mr Sheppard's question and I considered that was more likely than not what had happened.

B. What was said in the 24 February discussion?

[19] On the same basis I have preferred Mr Sheppard's recall of the comment made by Mr Hart in their 24 February meeting. After Mr Hart had confirmed he had a conviction for murder, Mr Sheppard asked why Mr Hart was not honest with him in his initial interview. He said Mr Hart replied *"you wouldn't have employed me if I had told you the truth*".

[20] Mr Hart had a different account of that part of the conversation. He said that he replied that he had been honest but had not said more about his criminal record because Mr Sheppard had not asked. When Mr Sheppard said he had asked about criminal convictions, Mr Hart recalled that he had replied that "*it wouldn't have made any difference anyway*".

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[1] *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013] NZEmpC 152 at [4]-[5].

[21] As submitted by Printlounge, Mr Sheppard's question about why Mr Hart had not been "*honest*" about other convictions supported the notion that Mr Sheppard had, in fact, asked about them in the January interview. I also considered Mr Hart was more likely to have replied with the words that Mr Sheppard recalled him saying because that was what, for Mr Hart, was the grim reality of his experience in seeking work.

C. Was Printlounge entitled to cancel Mr Hart's employment?

[22] Printlounge submitted that – assuming the Authority accepted Mr Sheppard's account of what he had asked and what Mr Hart had said – it was entitled to cancel Mr Hart's employment agreement under s7(3) and (4) of the Contractual Remedies Act 1979 (the CRA).

[23] The relevant portion of those provisions were as follows:

> *(3) Subject to this Act, ... a party to a contract may cancel it if—*
> *(a) he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; ...*
>
> *(4) Where subsection (3)(a) ... applies, a party may exercise the right to cancel if, and only if,—*
> *(a) the parties have expressly or impliedly agreed that the truth of the representation ... is essential to him; or*
> *(b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—*
> *(i) substantially to reduce the benefit of the contract to the cancelling party; or*
> *(ii) substantially to increase the burden of the cancelling party under the contract; or*
> *(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.*

[24] Printlounge submitted it was induced to enter an employment agreement by a misrepresentation made by Mr Hart and the right to cancel that agreement arose because the parties had impliedly agreed that the truth of what Mr Hart said about not having other convictions was essential to Printlounge. The implication of the essential nature of the truth of that representation was said to have been clear from Mr Sheppard having asked the question and then taking time over the weekend to consider whether, in the circumstances of understanding there was only one conviction, to offer Mr Hart the job.

[25] As acknowledged in both parties' submissions, a prospective employee has no general duty to voluntarily reveal material information about herself or himself, but if an employer has asked and the prospective employee has chosen to answer, the answer must be honest and full.[2]

[26] Mr Hart had given Mr Sheppard a quite detailed description of the events at the party that lead to Mr Hart's assault conviction and prison sentence in 2011. It created an impression with Mr Sheppard that the conviction was what he called "*a one off*". That impression, combined with Mr Hart's assurance (which I have found he more likely than not gave) that there were no other convictions, clearly induced Mr Sheppard's decision for Printlounge to enter its contract – as an employment agreement – with Mr Hart.

[27] The next stage of inquiry in the CRA analysis – about whether there was an express or implied agreement that the truth of the representation was essential – is an objective test, that is how it would appear to a reasonable observer rather than what one or other party says about the circumstances after the event.[3] On that basis I concluded such an observer would have considered – from Mr Sheppard's question about other convictions and the time he then took to consider offering the job in light of the information about one conviction – that the truth of what Mr Hart said was impliedly agreed as fundamental, that is essential, to the offer of the job.

[28] Accordingly Printlounge was entitled to cancel the agreement on those grounds. Arguably it may also or alternatively have been entitled to do so under the criteria at s7(4)(b) of the CRA as the effect of Mr Hart's misrepresentation either decreased the benefit of its employment agreement with him or increased the burden of that agreement on Printlounge. Such effects must be proved and not merely assumed.[4] Mr Sheppard's evidence was that he cancelled the agreement (by dismissing Mr Hart) because of three considerations – fears for the safety of other staff (or at least that they would become fearful and might leave their jobs), the effect on the reputation of his business (and possible loss of custom as a result) and a loss of trust and confidence in Mr Hart. Mr Sheppard said he was sure his staff of ten,

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[2] *Murray v A-G* [2002] 184 at [44].
[3] *Skywards Catering Limited v Apthorp-Hall* [1995] 2 ERNZ 218 at 226.
[4] Above at 226.

including three women, would have become "*very uncomfortable*" working with Mr Hart once they learned of his previous history (which they inevitably would as rumours in the printing industry circulated). More evidence – beyond Mr Sheppard's assertions – about actual or likely such effects on staff and the business would have been necessary to make findings on those grounds. However Mr Sheppard's loss of trust in Mr Hart was a self-evident consequence of the discovery of the fuller picture in February and, arguably, rendered the employment agreement of less benefit, greater burden or substantially different from that represented or for which Printlounge had contracted. Mr Hart had already become a trusted employee in the few weeks of his employment. He was given keys and access codes to the premises. Mr Sheppard confirmed he had no doubt or concern about the quality of Mr Hart's work or capability. The trust and confidence Mr Sheppard had in Mr Hart was, however, fundamentally fractured by the discovery that he had not answered fully or truthfully when asked about having other convictions. Mr Sheppard thought he was giving a 'second chance' to a former prisoner with a 'one off' conviction, but his discovery of the truth revealed risks to his business for which he (literally) had not bargained.

D. Was the dismissal of Mr Hart carried out in a fair way?

[29] Printlounge's right to cancel Mr Hart's employment agreement did not, however, relieve it of other obligations to him before deciding to do so. In considering whether his employment agreement might be open to cancellation due to a pre-contractual misrepresentation, Printlounge had to act in a way consistent with its obligations as an employer under s103A of the Act and with Mr Hart's rights under s4 of the Act. In short, it had to follow a fair process (including providing a fair opportunity to comment on information relevant to a decision that would have an adverse effect on the continuation of his employment) before making such a decision.

[30] There was no dispute that Mr Sheppard had called Mr Hart to a meeting with him without any notice of it or of the right to bring a representative. Mr Sheppard gave frank evidence that he was nervous about raising the matter with Mr Hart because he did not know how Mr Hart might react. Mr Sheppard did not get any professional advice before holding the meeting or do anything further to investigate the information he had (from a printing industry source and the *Metro* article). Once Mr Hart confirmed that he did have a conviction for murder, Mr Sheppard ended his

employment summarily. While it was highly unlikely that Mr Sheppard's decision would have been any different if he had provided more opportunity to Mr Hart to engage a representative and to take time to think about what he might say in response, the process may have made some difference to the timing and terms on which Mr Hart's employment ended. The issue of his final pay (dealt with later in this determination) was one such point.

[31] The effect of Mr Sheppard's actions was that *how* he put the issue to Mr Hart was not justified in terms of the criteria at s103A(2) of the Act, although *what* he decided was a decision open to a fair and reasonable employer in all the circumstances at the time (in light of the finding in this determination that Mr Sheppard had asked Mr Hart at the job interview about other convictions). The result was that Mr Sheppard's actions were – under the statutory test – unjustified but the extent to which that was the case had an effect on the remedies available to Mr Hart.[5]

E. What remedies and reduction for contribution are required?

[32] A number of factors limited the extent of Mr Hart's claim for lost wages from 24 February 2014. The period of assessable loss was probably limited to three months as he had surgery in late May, that he had waited two years to get, and was not able to resume his job search until mid-July. However that period of loss may also have been limited dependent on an assessment of how or whether the failings in Printlounge's process affected his notional loss. Apart from that there was sufficient evidence that Mr Hart made reasonable endeavours to seek new work after the termination of his employment by Printlounge, although the scope of what he could do and where he could go to work was limited by parole conditions. His likely award for lost wages was for 10 weeks of his average earnings (with his actual hours having ranged from around 24 to 48 hours a week according to payslips provided by Printlounge). He would also have been entitled to an award of compensation for humiliation and loss of dignity under s123(1)(c)(i) of the Act on his evidence about the effect on him of how he was dismissed. In the general range of awards, and considering the requirement for such awards to be set at modest levels, $5000 was the likely award.

[5] *Waitakere City Council v Ioane* (No 2) [2005] ERNZ 1043 (CA) at [35].

[33] However the assessment required under s124 of the Act has resulted in a total reduction of remedies that might otherwise have been awarded.

[34] The Authority is required to consider the extent to which the actions of an employee contributed towards the situation that gave rise to the employee's personal grievance. If those actions so require, the remedies that would otherwise have been awarded must be reduced.

[35] Pre-contractual conduct, including misrepresentation to secure a job, may amount to blameworthy conduct requiring reduction of remedies.[6]

[36] In this case Mr Hart was entirely responsible for the state of affairs in which Mr Sheppard made a job offer to him based on incomplete information as Mr Hart had withheld the full information when asked. It was that action that contributed, once the true position was discovered, to the situation giving rise to Mr Hart's grievance. In a broadly similar case – where a worker had withheld information about assault convictions but the employer had made procedural flaws when deciding to dismiss the worker – the Employment Court found the appropriate level of reduction of remedies due to contributing behaviour by the worker was 100 per cent.[7] I considered the same conclusion must apply in Mr Hart's case.

F. Are any wages still due to Mr Hart?

[37] During the Authority's investigation an issue arose as to whether Mr Hart was still owed a day's wages or should have been paid a week's notice at the end of his employment.

[38] His employment agreement included a term stating that Printlounge could terminate his employment agreement "*for cause, by providing 1 weeks notice*" with a discretion for the company to pay in lieu for some or all of the notice period.

[39] While the agreement also provided for summary dismissal (without notice) for serious misconduct, that provision applied to conduct as an employee (that is, once the employment relationship had begun). It did not apply to before then, which in this case, was Mr Hart's misrepresentation during the job interview.

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[6] *Skywards Catering Limited (t/a Wings Bar and Restaurant) v Apthorp-Hall* [1995] 2 ERNZ 218 at 228.
[7] *Tai v Robinson t/a Coronation Lodge Rest Home* [2004] 1 ERNZ 270 at [104]-[107].

[40] Taking the employment agreement to have been cancelled due to misrepresentation under s 7(3)(a) of the CRA, a difficult point of construction arose. Under s 8(3)(a) neither party was obliged to perform, or entitled to any further performance of, the employment agreement – arguably meaning Printlounge did not have to 'perform' the obligation of paying notice for a termination 'for cause'. However s 8(3)(a) starts with a proviso that it is "*subject to the [Contractual Remedies] Act*" and s 5 of that Act states under the heading 'Remedy provided in contract":

> *If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 relate, those sections shall have effect subject to that provision. (emphasis added)*

[41] Interpreted broadly, the employment agreement provision for termination "*for cause*" is arguably such an express provision for a remedy for misrepresentation (as one of many reasons that might amount to 'cause'), and under s5 of the CRA should apply to the circumstances of a cancellation of the agreement under s7 of that Act.

[42] Mr Sheppard acknowledged in his oral evidence at the Authority investigation meeting that payment of notice to Mr Hart was something "*maybe we should have done*". It was not something he had considered or got advice on at the time.

[43] Taking the cancellation under the CRA as a termination 'for cause' under the terms of Mr Hart's employment agreement – applicable because of what s5 of that Act says about the basis on which cancellation takes effect – I concluded Mr Hart should have been paid a week's notice. However an order for payment of that amount – for 40 ordinary hours – has not been made in this determination, pending resolution of any costs issues (if required), as it is an amount that may be 'offset' in that calculation.

G. Costs

[44] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. Counsel will be aware that, in most cases, the Authority applies a daily tariff (here totalling $1750 for a half-day investigation meeting). The tariff, if applied, is subject to adjustment up or down according to particular factors of the case

and relevant principles in setting costs.[8] Mr Hart's means to pay an award of costs would be one such factor (subject to evidence).

[45] If the parties are not able to resolve costs themselves and an Authority determination is required, Printlounge may lodge and serve a memorandum as to costs by 12 December 2014 and Mr Hart should then lodge a reply memorandum by 19 December 2014. No submissions will be considered outside that timetable without prior leave being sought and granted.

Robin Arthur
Member of the Employment Relations Authority

[8] *PBO v Da Cruz* [2005] ERNZ 808, 819-820.