IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 51/10
5151333

	BETWEEN	MARC LIDIARD Applicant
	AND	NEW ZEALAND FIRE SERVICE COMMISSION Respondent

Member of Authority:	Philip Cheyne
Representatives:	Amy Shakespeare, Counsel for Applicant Peter Churchman, Counsel for Respondent
Investigation Meeting:	8 December 2009 at Christchurch
Determination:	8 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marc Lidiard was employed by the NZ Fire Service Commission (NZFS) as a firefighter from February 2003. He resigned in January 2008. In February 2008, an event occurred that led NZFS to offer him 12 months leave without pay (LWOP) pursuant to the applicable collective employment agreement in place of the resignation. Mr Lidiard remained on LWOP until 29 October 2008 when NZFS cancelled his employment contract dismissing him after its investigation concluded that he had gained his employment initially because of a misrepresentation relating to his medical history by answers he gave in a pre-employment health questionnaire. Mr Lidiard says that this dismissal is unjustified and he claims reinstatement and other remedies.

[2] There is some dispute about the facts but Mr Lidiard's grievance mostly concerns whether the employer can justify its decision to dismiss him in accordance with the law. There are issues about the lawfulness of the health questionnaire given the Human Rights Act 1993 and the Privacy Act 1993, whether NZFS is entitled to rely on the Contractual Remedies Act 1979 and whether the dismissal was justified in accordance with s.103A of the Employment Relations Act 2000. I will address these points in turn dealing only with the facts necessary to resolve each part of Mr Lidiard's claim.

Human Rights Act 1993

[3] When he was initially employed, Mr Lidiard completed a questionnaire about his medical history. Although Mr Lidiard had been treated in the past for post-traumatic stress disorder and depression, he did not disclose that information. If Mr Lidiard had given truthful answers to several specific questions on the medical history form, the information would have been disclosed. As Mr Lidiard's counsel put it in submissions:

> *It is not disputed that Marc Lidiard answered both of these questions in the negative, and that these answers were not correct.*

[4] An important submission for Mr Lidiard is that the questions about his health status were unlawful so that his false answers cannot justify the subsequent dismissal: see *Imperial Enterprises Ltd v. Attwood* [2002] 2 ERNZ 740.

[5] In *Attwood*, the grievant filled in a pre-employment form answering *yes* to the question *Do you have any medical problems of any kind*. She gave details of one condition but did not mention several other medical conditions. After some months of employment, the grievant had a number of days off work because of illnesses over the space of several months. It came to the employer's attention that she suffered from several medical conditions which she had not disclosed in response to the general question above. The employer subsequently dismissed the grievant principally because of her failure to disclose her full medical situation. The Employment Court found that the question on the pre-employment form did not provide any safeguards against unlawful discrimination and was unlawful in light of s.23 of the Human Rights Act 1993 (the HRA) which prohibits questions that indicate or could reasonably be understood as indicating an intention to unlawfully discriminate against an applicant for employment.

[6] Michelle Richards is the NZFS' senior HR consultant. She gave evidence about the recruitment processes and policies. The Australasian Fire Authorities Council (AFAC) has developed guidelines for health and fitness monitoring of Australasian fire and emergency services workers. Ms Richards' evidence, which I accept, is that NZFS has implemented a system of pre-employment health assessment questionnaires designed to identify whether or not an applicant for the role of firefighter has a physical or mental health condition which potentially creates a risk for themselves, other firefighters or members of the public. The AFAC guidelines list health conditions that could impact on work as a firefighter. Some conditions preclude safe performance of active firefighting duties and require medical clearance while others require a thorough risk assessment to determine whether the person is capable of full duties with or without restrictions. The AFAC guidelines appear principally designed to address health issues arising during employment but I accept that the same issues and principles arise in respect of prospective employees.

[7] The evidence of NZFS is that it does not discriminate against people with mental health problems but uses the health questionnaire at the stage of application for the role of firefighter to assess whether a candidate's condition is likely to be consistent with them safely carrying out all aspects of the job. Dr Peter Robinson is the principal medical officer for NZFS. His evidence, which I accept, is that NZFS would have considered in detail Mr Lidiard's medical history (if disclosed) before making a decision whether or not to employ him or arrange a suitable programme to facilitate his employment. Ms Richards' evidence, which I also accept, is that NZFS would have arranged a medical review and it is highly likely that they would have decided to obtain a detailed report on Mr Lidiard if he had properly answered the questions on the pre-employment questionnaire form. Although there can be no certainty about it now, Mr Lidiard might not have been offered employment if he had disclosed his history.

[8] Relevantly here, s.23 of the HRA provides that it is unlawful for a person to use an employment application form which indicates, or could reasonably be understood as indicating, an intention to unlawfully discriminate. The present form (FSC211-97) is four pages long and starts with the instruction to return the form to the *Medical Vetting Coordinator* using the pre-addressed envelope provided. It is a detailed health questionnaire about the candidate's physical and mental health. There is an additional form headed *New Zealand Fire Service – Application Form* to be

returned to the recruitment manager that elicits work history and standard CV-type information from a candidate. The separate consideration of the detailed medical information from other aspects of the recruitment process indicates that the medical information is requested for the purposes of assessing a person's physical and mental fitness to perform the role and duties of firefighter, part of assessing whether the person is qualified for the job. I do not accept that the form could reasonably be taken as indicating an intention to unlawfully discriminate.

[9] Section 29 of the HRA is an exception to the prohibition on discrimination and permits different treatment based on disability where the environment for or nature of the duties is such that a person could perform them only with an unreasonable risk of harm to themselves or others. However, there is a limitation to the s.29 exception. It does not apply if the employer could, without unreasonable disruption, take reasonable steps to reduce the risks to a normal level. The evidence of NZFS indicates that there is a significantly increased risk of harm arising in the performance of a firefighter's duties for those with certain types of mental illnesses or who are taking certain types of medication as a result of such illnesses. Whether or not the exception or the limitation operates in any individual case depends on the individual applicant's condition and its management. NZFS must be entitled to assess its legal obligations and can only do that by asking appropriate questions to elicit the necessary information from the applicant and, if necessary, seeking expert reports.

[10] The submission for Mr Lidiard is that NZFS can ask health questions about his mental health solely for the purpose of determining whether any special accommodation is required so as to bring his situation within the limitation to the s.29 exception. The further submission is that such questions could only be asked after the initial assessment had determined that an applicant was otherwise suitable for employment or a risk is created that an applicant who is entitled to reasonable accommodation might be discriminated against. I do not accept that submission on the facts here. I accept that mental health is an important consideration in whether a person can properly and safely perform the role of firefighter as identified in the AFAC guidelines. As already mentioned, NZFS was entitled to assess whether the s.29(1) exception applied and could only do that by seeking information from Mr Lidiard.

[11] In support of these submissions, counsel points out that the evidence discloses that NZFS continues to employ people who suffer from mental illness. That evidence indicates that NZFS does not discriminate against people with a mental illness. It also supports NZFS' contention that it needs to know about the nature of a person's illness in order to assess whether it can reasonably and safely be accommodated so as to continue or permit the person's employment.

[12] In *Attwood*, part of the problem for the employer was the breach of the Privacy Act 1993 arising from its failure to properly identify the purpose for which it was collecting personal information such as the health information. In this case, the application form includes an explanation of the reasons for the collection of information. The application form and the health questionnaire were filled out by Mr Lidiard at the same time so he can be taken as understanding that the privacy statement in the application form applied to all the information he provided. Accordingly, that part of the *Attwood* reasoning does not assist Mr Lidiard.

[13] For the foregoing reasons, I do not accept that there was any breach of either the HRA or the Privacy Act 1993 arising from the NZFS health questionnaire. Mr Lidiard had an obligation to truthfully answer the questions asked and he is not immune from the consequences of his failure to do so.

Contractual Remedies Act 1979

[14] There is a submission for Mr Lidiard that NZFS cannot rely on the Contractual Remedies Act 1979 (CRA) to cancel the employment contract.

[15] Part of the submission is that NZFS relied on s.7(4)(b) rather than s.7(4)(a) throughout its correspondence. I do not accept that submission. The draft investigation report, for example, specifically referred to the ground set out in s.7(4)(a).

[16] It is submitted that s.7(4)(a) of the CRA has no application anyway because the parties did not expressly or impliedly agree that the truth of Mr Lidiard's representations about his health was essential. I reject the submission. The health questionnaire ends with a signed declaration that the answers given are true and correct and that the information is *full and complete and I have kept nothing back which might cause you to assess me as a greater risk during firefighting operations.*

Implicit in these words is that the truth of the representations was essential to the employer's consideration of the application.

[17] In addition, the application form includes another declaration that Mr Lidiard has not withheld information which could affect the decision to employ him and that he could be dismissed if employed but it was later discovered that he had withheld information. That statement is an express agreement that the truth of Mr Lidiard's representations was essential. I have already noted that the application form and the health questionnaire are properly read together.

[18] The next submission made on Mr Lidiard's behalf is that s.7(4)(c) dealing with the effect of a misrepresentation also does not apply. Because of the foregoing finding that s.7(4)(a) applied, it is not necessary to determine this point.

[19] Although not pressed in submissions, perhaps because of the clear evidence mentioned below, Mr Lidiard's statement of problem includes the assertion that when NZFS re-employed him it did so in full knowledge of his earlier misrepresentation so as to affirm the employment contract. If that is so, NZFS is not entitled to cancel the contract: see s.7(5) CRA. I need to set out more about what happened to resolve this point.

[20] Mr Lidiard's last day of active duty was 13 February 2008. At that time, Dan Coward was Chief Fire Officer so had a line management responsibility for Mr Lidiard's senior officers. When various matters were reported to Mr Coward around the time that Mr Lidiard ceased active duty, he became concerned for Mr Lidiard's health and wellbeing, in particular the possibility of an imminent suicide attempt. Mr Coward and his deputy spoke to Police who went to Mr Lidiard's flat to speak with him. Mr Lidiard managed to convince Police that they should not intervene further, following which he did make an attempt on his life. That resulted in Mr Lidiard's hospitalisation. When Mr Coward heard of this he and his deputy visited Mr Lidiard in hospital. Mr Coward thought that the suicide attempt could be linked with stressors from the work environment. He sought advice from an NZFS HR consultant and decided to offer Mr Lidiard the opportunity to take LWOP within the terms of the collective employment agreement in place of the resignation. That was conveyed by letter dated 15 February 2008 and agreed to by Mr Lidiard. As a result, Mr Lidiard commenced 12 months' LWOP on 11 February 2008. The backdating was apparently for the purposes of ensuring continuity of employment if

Mr Lidiard was later re-engaged. Whether this amounts to an affirmation of the employment contract for the purposes of the CRA depends on Mr Coward's state of knowledge as at 15 February 2008.

[21] Mr Lidiard's misrepresentation were the false answers given to the following questions:

> *During the last five years have you … had a medical examination, advice or treatment …*
>
> *During the last five years have you … been a patient in a hospital, clinic …*
>
> *Have you ever had any of the following … mental illness, depression or anxiety state*
>
> *Have you ever had any of the following … any other operation, disability, illness or injury*

[22] Neither Mr Coward nor other managers within NZFS knew that Mr Lidiard's answers to these questions were false until various reports and information were sought starting in mid-March 2008 in connection with Mr Lidiard's desire to return to work before the end of the 12 month period of LWOP. Dr Robinson, when he saw the reports provided in response to Mr Lidiard's expressed desire to return to work, became concerned that there appeared to be a history of mental illness prior to Mr Lidiard's original employment and he could not understand how Mr Lidiard had been employed initially without specialist medical reports into his mental health. Dr Robinson raised these concerns with HR, following which the matter was reported to NZFS managers, there was an investigation and Mr Lidiard was eventually dismissed.

[23] What Mr Coward knew as at 15 February was that Mr Lidiard had made an attempt on his life following an apparently recent unwellness that might have contributed to his decision to resign and which might have been connected to the work environment. Mr Coward knew nothing of Mr Lidiard's significant history of mental illness that predated his original employment with NZFS. Indeed, when questioned, Mr Lidiard agreed with this. Accordingly, I find that NZFS did not affirm the employment contract in full knowledge of Mr Lidiard's earlier misrepresentation.

[24] I find that NZFS was entitled to cancel Mr Lidiard's employment contract pursuant to s.7(4)(a)CRA.

Justification for dismissal

[25] The finding just mentioned is not a complete answer to the question of whether NZFS' actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time. There are a number of issues raised on Mr Lidiard's behalf that need now to be canvassed. I accept counsel's submission that it is important to assess justification in light of all the circumstances at the time. I should say that NZFS' investigation was generally full and fair. Indeed Mr Lidiard agreed with that proposition in his evidence. However, more must be said about the following issues.

[26] During the disciplinary investigation, Mr Lidiard explained his false answers to the health questions by saying that he had miscalculated the time since the previous manifestations of his illness. NZFS did not accept that explanation. Robert Saunders is NZFS' Regional Commander. It was his decision to reject Mr Lidiard's explanation. At the end of the disciplinary process, on 20 October 2008, Mr Saunders told Mr Lidiard that he did not accept his explanations and that he was dismissed with a letter to follow setting out fully the reasons for the dismissal. Before Mr Saunders could send this letter, Mr Lidiard requested another meeting. At that meeting, Mr Lidiard told Mr Saunders that his explanation was not true and that the real reason for not disclosing his medical history was fear of discrimination. It follows that NZFS was correct to reject Mr Lidiard's initial explanation of genuine mistake. Any fair and reasonable employer would similarly have rejected the initial explanation.

[27] Counsel for Mr Lidiard accepted that NZFS was entitled to assess his non-disclosure as deliberate and dishonest but argued that this was mitigated by Mr Lidiard's fear of discrimination and that there was no harm to others. I do not accept that there was no harm to others. NZFS was denied the opportunity to properly assess Mr Lidiard as a candidate fit to perform the role of firefighter or fit subject to reasonable accommodations as appropriate. Its employment of Mr Lidiard created some risk to himself and others owed duties by NZFS without it having a chance to manage that risk. NZFS' position as an employer was, therefore, harmed. I will return shortly to the fear of discrimination point.

[28] I accept counsel's point that non-disclosure of a conviction (not relevant here) could be more serious than non-disclosure of a medical condition. In such a case it can be the hidden information itself rather than the fact of non-disclosure that causes

particular concern. It all depends on the context. In the present case, the loss of trust arose from the fact of deliberate non-disclosure rather than specifically what was not disclosed. It is not disputed that Mr Lidiard performed his duties as a firefighter to a very high standard. It is apparent from the letter setting out the reasons for the dismissal that Mr Saunders gave consideration to that factor but ultimately judged it not sufficient to prevent his loss of trust and confidence.

[29] Counsel submits that I should have regard to what the employer would have done had the disclosure been made prior to employment. It is by no means certain on the evidence that NZFS would not have employed Mr Lidiard but it is clear enough that further medical reports would have been sought and perhaps reasonable accommodations would have been made to support Mr Lidiard's employment. The point is made that at the time of the dismissal Mr Lidiard was in exactly that same position. To return to work from LWOP he needed to prove his fitness for active duty which required appropriate medical reports. That might have led NZFS to provide reasonable accommodations in accordance with the AFAC guidelines. In other words, prior to the dismissal NZFS came to be in the same position it would have been in if Mr Lidiard had truthfully answered the questions. However, the submission overlooks the effect on the relationship of trust and confidence given Mr Lidiard's deliberate non-disclosure of the important information.

[30] It is submitted that Mr Lidiard's health issues towards the end of his employment did not endanger or harm any other person, and that he resigned so as to avoid causing those effects for his colleagues. I accept that in large measure, but it does not assist Mr Lidiard here. What was harmed was NZFS' ability to properly assess Mr Lidiard as a candidate for employment at the outset and the relationship of trust and confidence.

[31] I am referred to *Fuiava v. Air New Zealand Ltd* [2006] ERNZ 806. In that case, the Employment Court refers to an early personal grievance decision (*Hepi's* case) to identify a series of issues relevant to the question of justification. Counsel then makes a number of points grouped under those headings in support of Mr Lidiard's position. To some extent, I have already responded to those submissions so I will not repeat those answers in what follows.

[32] I accept that Mr Lidiard had no malicious intent toward NZFS but as explained I do not accept that it was not harmful. I do not accept that the only benefit for

Mr Lidiard was that he was selected as suitable for employment on his merits. Only part of the relevant information was made available to NZFS. The evidence is that if all of the merits of Mr Lidiard's application were known to NZFS it may not have employed him. Mr Lidiard derived significant benefit by eliminating NZFS' access to potentially negative information about him. However it is not disputed that he proved himself to be a very able firefighter.

[33] There is a submission that NZFS changed from being supportive of Mr Lidiard to dogmatically insisting on his punishment by dismissing him. That is not a fair characterisation. NZFS was very supportive of Mr Lidiard in February 2008. It then learned of his non-disclosure and initiated a disciplinary investigation. It is the change of knowledge rather than a change of attitude that was important. On my assessment, NZFS managers remained (and are still) personally supportive of Mr Lidiard. It is common ground, for example, that NZFS is prepared to consider any further application for employment from Mr Lidiard under its re-engagement policy which provides Mr Lidiard with advantages compared with the population at large.

[34] There is evidence to the effect that there is a high level of mistrust between senior management and operational staff within NZFS. That leads counsel to submit that trust and confidence between a firefighter such as Mr Lidiard and senior management is not necessary for that person to be able to work effectively; but that the confidence of colleagues and immediate supervisors is more important. There is extensive evidence, all certainly accurate, as to how well regarded Mr Lidiard is by his colleagues and immediate supervisors. Indeed, there are personal references that speak highly of Mr Lidiard outside the context of his employment with NZFS including from a Member of Parliament. However, the submission misses the point, which is whether Mr Lidiard's conduct deeply impaired or was destructive of the relationship of trust and confidence between him and his employer. Mr Saunders is simply the person entrusted by NZFS to make that assessment in this case. The relationship generally between senior management and operational staff is irrelevant unless it somehow was a factor in the decision to dismiss Mr Lidiard. There is no good evidence to prove that general relationship issues had any impact on Mr Saunders' decision to dismiss Mr Lidiard.

[35] There is an aspect of the dismissal already mentioned but not dealt with sufficiently. Counsel refers to the advice received by Mr Lidiard from his former

advocate (not counsel and not the Union). Mr Lidiard's evidence is that the advocate advised him to say that his false answers resulted from miscalculation rather than a deliberate decision to withhold information because of his fear of discrimination. I have not heard any evidence from his advocate, but I will assume that Mr Lidiard's evidence is true. It does not assist Mr Lidiard's position. The statutory obligation is for those in an employment relationship to deal with one another in good faith which includes not misleading one another. Acting on advice, Mr Lidiard breached that obligation. The issue about the bad advice is between Mr Lidiard and his advocate and cannot be used to undermine the employer's ability to justify the dismissal. It is to Mr Lidiard's credit that he decided to be honest with Mr Saunders but it was by then too late to change the outcome. NZFS had already decided to dismiss Mr Lidiard. If it had reopened the investigation Mr Lidiard would have had to deal with an additional allegation of misconduct – that of a lie told in denial of alleged misconduct: see *Honda NZ Ltd v NZ Shipwrights etc Union* [1990] 3 NZILR 23.

[36] That leads on to a point made by counsel about the stigma attached to mental illness. It might be understandable that a young man such as Mr Lidiard would think he should hide his mental health history to avoid any risk of discrimination. There will be differing views on that. In doing so, however, Mr Lidiard exposed himself to the risk of adverse consequences should his employer later discover his falsehood. His other option was to properly answer the questions asked and rely on the anti-discrimination provisions in the HRA, and the remedies available for a proven breach of that Act if necessary.

[37] Some evidence was led to suggest some disparity of outcome for Mr Lidiard compared with others who have misconducted themselves. I accept that the point was not raised to any great extent during the disciplinary investigation. I also accept Ms Richard's evidence that there is no other case the same as Mr Lidiard's. It follows that there was no disparity.

[38] The final point to mention is the evidence from Mr Lidiard's colleagues to the effect that NZFS should have applied other options rather than dismissing him. The evidence reflects a great camaraderie amongst firefighters and Mr Lidiard's good standing amongst his colleagues. Only NZFS had the benefit of a full investigation into what happened. I am satisfied that its actions and how it acted were what any fair and reasonable employer which have done in the circumstances.

Summary

[39] A fair and reasonable employer should consider an employee's explanation as to whether or why they acted in breach of their obligations. That is exactly what NZFS did. It rejected his explanation about miscalculation. NZFS determined that Mr Lidiard's untruthful answers deeply impaired its trust and confidence in him as an employee and dismissed him. In all these steps NZFS acted as would have any fair and reasonable employer. Mr Lidiard was not unjustifiably dismissed.

[40] Costs are reserved. Any claim for cost should be made within 28 days by lodging and serving a memorandum. The other party may then lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority