IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 264
5348117

BETWEEN	X Applicant	
A N D	OCEANIA GROUP (NZ) LIMITED Respondent	

Member of Authority:	Helen Doyle
Representatives:	Jock Lawrie, Counsel for Applicant Kylie Dunn/Anna Smith, Counsel for Respondent
Investigation Meeting:	27 April 2012 and 25 June 2012
Submissions Received:	29 June 2012 for Applicant 6 July 2012 for Respondent
Date of Determination:	3 December 2012

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] The applicant applied for prohibition of publication of her name and/or details of the criminal charge and subsequent conviction that relate to her dismissal under clause 10 of schedule 2 of the Employment Relations Act 2000. The main ground advanced in support of the application was that the impact of publication on X's mental health was such that it outweighed the principles of open justice.

[2] The respondent advised the Authority that the applicant's name had already been published in relation to her sentencing on the criminal charge and that usually such orders are not made. That aside, there was no particularly firm position on the application for prohibition from publication.

[3] The Authority asked for a medical certificate in support of the application and this was provided shortly before the investigation meeting. The medical certificate provided that there was potential for a relapse in the applicant's mental health

including alcohol issues if her name was published. The applicant at the time of the Authority's investigation meeting had reverted to her maiden name and therefore the earlier publication of her name, as it was then, was not as relevant as it could have been.

[4] The Authority considered the matter at the commencement of the investigation meeting on 27 April 2012. I advised counsel I was satisfied in this case that it would be just on the basis of the medical reasons put before the Authority to exercise the power in clause 10(1) of Schedule 2 to the Employment Relations Act 2000 and prohibit publication of the applicant's name or any information that may led to her identification. That does not extend to the details of the criminal conviction. I shall refer to the applicant in this determination as X.

Employment relationship problem

[5] It is useful in this case to start by setting out some of the events that took place before the commencement of employment. X is a registered nurse. She has been nursing in excess of 30 years and describes it as her passion. X viewed her professional life as one of achievement but described her personal life as a different story. She said that she was in an emotionally and physically abusive relationship with her former husband for many years and towards the end of the marriage began drinking heavily to cope.

[6] In November 2009 X attempted to take her life by setting fire to her car in the garage of the rental property she was occupying. She described herself coming to her senses at the last moment and getting out of the vehicle but the fire caused damage to two properties. X was charged with two counts of arson both relating to the same fire.

[7] X contacted the Nursing Council and advised them that she was facing a charge of arson. The Nursing Council maintained the conditions that had pre-existed on her practising certificate. The conditions were:

- Regular appointments with the alcohol and drug clinic;
- Three monthly blood tests to confirm that no alcohol was being consumed;
- Employer approval regarding Nursing Council conditions.

[8] After the November incident X was admitted to a mental health unit briefly and attended a rehabilitation programme. In March 2010 she resigned from her nurse manager role with a District Health Board having been on suspension since November 2009.

[9] In or about April 2010 X saw an advertisement in the newspaper for a clinical nurse leader position at one of Oceania's rest home and hospital facilities. She spoke in person with the Facility Manager, Helen Port when she picked up a job description application form. X told Ms Port about the conditions on her practising certificate and the background to the incident in November 2009 about which she was facing a charge. There was some uncertainty in the evidence as to whether Ms Port would have known that X was on bail. X described Ms Port as sympathetic to her situation.

[10] X took the application and job description away to complete and she spoke to her lawyer about it. The application form required X to answer yes or no as to whether she was awaiting the hearing of charges in the civil or criminal court and, if so, to detail what they were. X circled *yes* that she was awaiting the hearing of charges and under detail wrote *recklessly setting fire to my garage*. She also circled *yes* that she agreed to undergo a police clearance.

[11] X was not appointed to the clinical leader's role but she was offered, and accepted, a registered nurse position by Ms Port working three night shifts per week. In that role X was in sole charge and supervised two care assistants in the care of about 40 residents. Ms Port left her employment in September 2010. After Oceania came to know about X's conviction and sentencing it became clear that Ms Port had not undertaken a police clearance as was the normal process and she had not brought the pending charges to anyone else's attention at Oceania before she left or at the time of her departure by way of handover.

[12] X commenced her employment on 12 July 2010 with a two week orientation and started the night shifts formally on 25 July 2010. She worked 24 hours per week and was paid an hourly rate of $26. X understood from discussions with Ms Port that she had written to the Nursing Council and notified them of her employment with Oceania. The Nursing Council required X to attend 30 minute meetings with the clinical nurse leader, Lee and monthly reports for the first three months of employment and thereafter three monthly reports required. X also applied for and

undertook work as a casual employee at another one of Oceania's facilities in or about September 2010.

[13] X was covered by the Oceania Group Collective Employment Agreement 1 April 2009 – 30 June 2010 between Oceania Care Companies No. 1 and No. 2 Limited, the Service and Food Workers Union Nga Ringa Tota Inc and the NZ Nurses Organisation Inc (the agreement). Clause 24 of the agreement dealt with acceptable behaviour in the workplace and referred to the disciplinary process in the employer's acceptable behaviour in the workplace policy being invoked in the event of behaviour that was not acceptable. The code of conduct is in fact the document that governs performance and disciplinary procedures.

[14] On 30 September 2010 X entered a guilty plea through her solicitor to the charge of arson and a conviction was entered at that time. A pre sentence report was requested.

[15] On 30 November 2010 X attended at Court for the purpose of sentencing having earlier been interviewed by the Probation Service so they could complete a pre-sentence report. The pre-sentence report considered the suitability of X for a possible sentence of home detention but recommended if the Court was considering a rehabilitative sanction then a sentence of supervision would be suitable together with reparation.

[16] X was sentenced to eight months home detention and although rostered to work the evening of 30 November 2010 was unable to because of her sentence. X advised the Nursing Council by telephone about her sentence and she felt it was unlikely after her discussion that her practising certificate would be removed. X was unable to get hold of anyone senior at Oceania on 30 November 2010 so advised another registered nurse that she was sick and would not be able to do the evening shift. On 1 December 2010 X telephoned the clinical nurse leader, Lee and let her know she would be absent for the rest of the week due to being on home detention. Lee questioned X at that stage as to why she had not told anyone about the situation she was facing. X advised Lee that it should be documented in her file and that she had told Ms Port.

[17] X was advised that Oceania considered the matter to be one of serious misconduct and two disciplinary meetings were held on 10 and 17 December 2010.

At the end of the disciplinary meeting on 17 December 2010 X was summarily dismissed following a joint decision by the human resources manager at Oceania, Dione Coleman and the acting facility manager, Helen Somers.

[18] X says that her dismissal was unjustified. In the statement of problem one of the remedies X wanted was reinstatement but that is no longer a remedy she seeks. X seeks reimbursement of lost wages for a period of 47 weeks in the sum of $29,328 and compensation of $12,500.

[19] Oceania says that the dismissal was justified in all the circumstances and that the procedure leading to X's termination was fair and reasonable.

The test in the Employment Relations Act 2000

[20] The statutory test of justification for the dismissal is the test set out in the former section 103A of the Employment Relations Act 2000. The dismissal occurred prior to 1 April 2011. This test provides:

> ***103A Test of justification***
>
> *For the purposes of section 103(1)(a) and (b) the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.*

The issues

[21] The Authority in this case has to consider the following issues:

- What was the reason for X's dismissal?
- Was there conduct relied on for dismissal that which a fair and reasonable employer would conclude was serious misconduct?
- Was the process leading to dismissal that of a fair and reasonable employer in all the circumstances?
- Would a fair and reasonable employer have made the decision to dismiss X in all the circumstances

- If the dismissal was not justified, then what remedies should be awarded and are there issues of mitigation and contribution?

[22] ,Ms Coleman was unwell at the date of the first investigation meeting. Ms Coleman's evidence by agreement with counsel was taken subsequently by way of a telephone conference.

What was the reason for X's dismissal

[23] I find that the reason for X's dismissal was contained in the letter sent to X confirming her dismissal of 17 December 2010. It was that there was a breach by X of clause 8.35 of the code of conduct. Clause 8.35 of the Code of Conduct provides:

> *Previous conviction or conviction whilst in the employment of the Company for a criminal offence which could reflect or impact negatively upon the Company or where the conduct giving rise to the offence affects ability or suitability for continued employment with the company.*

[24] The termination letter provided that whilst X informed the Manager who hired her at the time of employment of her circumstances she has since been convicted of a serious crime which could seriously harm Oceania's reputation.

[25] Ms Somers and Ms Coleman made the joint decision to dismiss. They gave their evidence at different times but they both agreed the reason for the dismissal was the conviction for arson and breach of the first part of clause 8.35 being a conviction for a criminal offence which could reflect or impact negatively upon the company.

[26] Ms Coleman said that the reason for termination was that the reputation of Oceania *was critical* and she did not believe having a *convicted arsonist* working there with the residents on night shift was tenable. Ms Coleman said that she felt X could make bad choices under pressure. Ms Somers said that she could not be sure about the safety of the residents and of X's mental state. Ms Coleman said that she had lost trust and confidence in X. In making the decision and having heard the evidence I find they took into account the vulnerability of the residents and their families and other staff in coming to a view about the reputation of Oceania if it continued to employ X with her conviction for arson.

[27] I accept Mr Lawrie's submission that there was different evidence from Ms Somers and Ms Coleman about the reliance in making a decision to dismiss on X's

failure to advise of her conviction and sentencing date. Ms Coleman gave evidence that she relied on that as part of the reason for dismissal but Ms Somers said that whilst she had been concerned about the failure to disclose, she said that this did not form part of the decision to dismiss.

[28] I am treating with some caution any view reached by them about the failure to disclose the court date. That is because I find Ms Coleman and Ms Somers thought that X was both convicted and sentenced on 30 November 2010. In fact X had entered a plea of guilty to two counts of arson two months prior on 30 September 2010. A pre-sentencing report had been ordered and prepared in the interim and therefore the November date was solely for sentencing on the charges. The only date referred to during the two disciplinary meetings held with X and her representative was 30 November 2010.

[29] This misunderstanding continued on to the statement of problem which referred to 30 November as the date of the applicant's conviction on the criminal charges. The statement in reply in para. 2 states that the applicant was convicted on criminal charges relating to arson on 30 November 2010 and as a result was placed on home detention. Ms Coleman's written statement of evidence refers to her understanding in para.16 that X was convicted of arson on 30 November 2010 and was immediately placed on home detention.

[30] It was not I find properly appreciated by Oceania until the statement of evidence was filed by X for the investigation meeting and, possibly even until the Authority investigation meeting itself, that there had been an earlier Court date at which X was convicted of arson.

[31] Any views reached then by Ms Somers and Ms Coleman as to what had or, had not been disclosed at the time the decision was made to dismiss, was without knowledge of the earlier date the conviction was entered and indeed X's continued employment from that date whilst convicted and on bail. For completeness I was not satisfied that X told Ms Port of her conviction in September before Ms Port left Oceania. That was not X's explanation at the disciplinary meetings. Any knowledge of Ms Port's I find was limited to pending charges. Further Ms Port makes no mention of that in the letter dated 14 March 2012 that was provided to confirm her knowledge of pending charges. Ms Port did not give evidence.

Was the conduct relied on for dismissal that which a fair and reasonable employer would conclude was serious misconduct?

[32] In this case the conduct relied on is not in dispute. X was convicted whilst in employment on 30 September 2010 of two counts of arson. She was remanded on bail for sentencing and a pre-sentence report. Sentencing took place on 30 November 2010 and X was sentenced to eight months home detention and ordered to pay reparation.

[33] Mr Lawrie submits that a conviction under clause 8.35 needs to have *ramifications* for the employment relationship. He submits that following conviction the employee must be a *markedly different proposition* in either character or ability from that previously represented to the employer. He submits X gave a full account of her actions and the pending charge before she commenced employment and therefore in the absence of any causal connection between the conduct giving rise to the conviction and any negative impact on Oceania the dismissal is simply the arbitrary imposition of further punishment.

[34] Although X told Ms Port about the background to the charge she was facing that does not, I find, prevent Oceania from relying on clause 8.35 when X was subsequently convicted of the charge. A pending charge can be defended, withdrawn or amended. It is the conviction that clause 8.35 is concerned with. Failing to disclose a criminal record or pending conviction on the employment application is a separate breach of the code of conduct.

[35] The conviction under clause 8.35 has to be one which could reflect or impact negatively on Oceania. Some convictions would not fall into that category. This was a conviction on two counts of arson. X worked the night shift with elderly residents, some of whom were vulnerable. She was in sole charge for the period of her shift supervising two assistants. Objectively assessed I find that having an employee convicted of arson in sole chare of some 40 elderly residents at night could reflect or impact negatively on Oceania in those circumstances. There had been a newspaper article that named X and gave her occupation. It did not refer to Oceania. Ms Somers could not recall any concerns from residents, staff or resident's families being expressed.

[36] In the particular work environment at Oceania where care was undertaken by X of the elderly I find that a fair and reasonable employer would find the breach of clause 8.35 of the code of conduct was serious misconduct that might justify dismissal.

***Was the process leading to dismissal that of a fair and reasonable employer in all the circumstances*?**

[37] X was advised of concerns regarding her conviction and sentence and that she should have a representative at both disciplinary meetings that were held on 10 and 17 December 2010. She knew there was a possibility of dismissal. X was competently represented throughout the disciplinary process by Carla Palmer who is an organiser with the New Zealand Nurses Organisation. It would also have been clear to both X and Ms Palmer that Ms Somers and Ms Coleman were shocked to learn about the conviction and sentencing after the event.

[38] Prior to the first disciplinary meeting that took place on 10 December 2010 there was only a vague reference by Ms Somers to Ms Palmer about the code of conduct and bringing the company into disrepute. Bringing the company into disrepute is a different breach again of the code of conduct to clause 8.35.

[39] X attended at the first disciplinary meeting with Ms Palmer. The probation officer who had prepared the pre-sentence report was also present. Ms Somers was present in person and Ms Coleman connected to the meeting by telephone. The concerns at the 10 December 2010 meeting focussed on frustration of contract because it was thought X could not work as a result of home detention and X's continued ability to hold an annual practicing certificate. I do not find that it was intended to limit the issue, as Ms Palmer said in her evidence was her understanding, to frustration of evidence because other matters were discussed. It was accepted that working on home detention was possible after the probation officer who also attended the meeting talked about different options to Ms Somers and Ms Coleman. It was clear that any concerns about the annual practicing certificate from the Nurses Council were at a preliminary stage.

[40] There was concern expressed as to why X had not kept Ms Somers proactively informed about the situation with the conviction and sentencing. X talked about the fact that she worked night shift with no real opportunity to talk to a Facility Manager

and there had been at least three different acting Facility Managers in the previous six months. X said that she did not have much notice of the court hearing date and that the judge had stated at sentencing that it should not affect her employment.

[41] X also read from some of her own notes that explained the background to the conviction, the fact that she had never had any other conviction and her disclosure to Ms Port. There was no reference in those hand written notes to the earlier date that conviction was entered. X apologised for not communicating with Oceania and the grief that was caused as a result. I was not satisfied that there was any discussion or clear allegation put to X before or during this meeting about a breach of clause 8.35 at this meeting. The concerns about how X would react under pressure and concerns regarding her mental state were not put to her at that meeting.

[42] The second meeting disciplinary meeting was conducted by way of conference call between, Ms Palmer and X and Ms Coleman and Ms Somers on 17 December 2010. Whilst both parties could recall X talking about her performance at work there was a dispute about whether clause 8.35 was referred to. There was no question that X was a very competent nurse and she had no performance issues. Ms Palmer said that it wasn't although X said that she could recall some mention of it during the telephone conference. Ms Somers and Ms Coleman said that it was. I find it more likely than not that it was raised. I was not satisfied that X had an opportunity to properly respond to it. I also think it likely that there was some discussion about trust and the ability for X to make clear decisions while under pressure. Ms Palmer suggested X go onto a probation period and there was an adjournment whilst that was considered but the decision was made then to dismiss.

[43] I find that there was unfairness in the process in that X was unaware of the specific allegation of misconduct that she was required to answer. The allegations were somewhat of a moveable feast. Ms Coleman when questioned by Mr Lawrie said that having concluded *a convicted arsonist* on the night shift wasn't tenable there was little that could have been said by X about a breach of clause 8.35. Nevertheless it should have been clearly put.

[44] The putting clearly of an allegation is a fundamental element of fairness. It is not a technical matter. It was in the mind of Ms Coleman and Ms Somer's from an early stage that continuation of the relationship was impossible because of the

conviction for arson and the negative impact on Oceania's reputation as a result. I find that a fair and reasonable employer would, having relied on a breach of clause 8.35, have put that to X.

Determination

[45] The process was unfair in the respect set out above and the unfairness was not simply of a technical nature. It is open to the Authority to find on that basis that the decision to dismiss was not one therefore that a fair and reasonable employer would therefore have reached. I have found though that there was serious misconduct in that X had a conviction that could have could have reflected or impacted negatively on the company in breach of its code of conduct.

[46] I have then considered whether dismissal was what a fair and reasonable employer would have done in all the circumstances. X was an excellent nurse and there were extenuating circumstances around her offending. Her probation officer concluded there was a low risk of re-offending.

[47] Against that a fair and reasonable employer would find loss of trust and confidence going to the heart of the employment relationship because X failed to disclose her conviction and did not advise of her sentencing date. Oceania was not involved in any interview with the probation officer notwithstanding it would be affected by a sentence of home detention. I do not accept that this failure to disclose by X was, Mr Lawrie submits, Oceania's fault. I do accept that Ms Port should have advised X that a conviction could have an impact on continued employment.

[48] Notwithstanding that a fair and reasonable employer would have concluded in all the circumstances of the work place where X was in sole charge on night shift of elderly residents that the employment relationship could not continue after X's conviction and sentencing for arson. There would be a significant finding of contribution on the part of X.

[49] The Employment Court in these circumstances has expressed a view that there may come a point where an employee's contributory conduct is so significant that it is not appropriate to make a finding of unjustified dismissal and better to conclude that dismissal was justified in spite of the process failures – *Kaipara v Carter Holt Harvey Limtied* [2012) NZEmpC 40.

[50] In this case I conclude that the most appropriate step to take is to find that the dismissal was justified in spite of the process failures.

[51] I find that X was justifiably dismissed from her employment with Oceania and she does not have a personal grievance.

Costs

[52] I reserve the issue of costs. The parties should attempt to reach agreement about these.

Helen Doyle
Member of the Employment Relations Authority