



Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Concealed Convictions Cost an Employer

A recent determination of the Employment Relations Authority drew a lot of negative publicity. The Authority granted remedies of \$6,750.00 compensation and 3 months lost wages (reduced by 25% due to the employee's contribution) in circumstances where the employee had been dismissed for failing to disclose that he had criminal convictions in an application form.

The facts surrounding the case in **Mr A v. B Ltd** [2014] NZERA Christchurch 44 are as follows:

1. Mr A was employed by B Ltd in October 2000.
2. In March 2007 Mr A applied to be appointed to a new position and as part of this process he was required to fill in an application form and answer Yes or No to a number of questions, including *"Have you ever been convicted of a criminal offence?"*
3. Mr A answered "No". He signed the application under a declaration including: *"The information I have provided herein and in response to questions clarifying the information is true and correct."*
4. However Mr A did have criminal convictions. In 1990 and 1992 he was convicted of serious offences for which he served two separate terms of imprisonment. The Authority prohibited the publication of any details as to the nature of Mr A's offending beyond what was detailed in the determination.
5. In March 2012 Mr A was promoted to a new role which required him to hold a Secondhand Dealers Licence. As part of that process the Police were provided with the opportunity of objecting. B Ltd came into possession of a letter from the Police, addressed to Mr A which contained the Police objection to Mr A holding a Secondhand Dealers Licence and set out his previous convictions. The Police considered the offending rendered Mr A an unsuitable person to hold a licence. It appears the Police were not aware of a suppression order of the original sentencing Judge.
6. B Ltd's knowledge of this led to Mr A's dismissal on 18 April 2013.

7. After an objection by Mr A's lawyer he was granted a licence by the Licensing Authority of Secondhand Dealers and Pawnbrokers on 6 May 2013.

The employee claimed that he had been unjustifiably dismissed and the employer contended that *"it was justified in dismissing Mr A and did so because he lied on his application form and because his offending was of the kind that meant it was impossible to keep him employed because his offending was greatly at odds with the company's culture and values."*

During the course of the formal disciplinary process arising from B Ltd's knowledge of the convictions, Mr A said that he had been told by WINZ not to disclose his convictions and he understood that was because he would have struggled to get a job otherwise.

Mr A was eventually stood down on pay until B Ltd reached a decision as to what should occur.

Despite having knowledge that Mr A had sought legal representation B Ltd concluded the formal process into these matters as follows:

"[23] On 18 April 2013 in the afternoon, Mr C rang Mr A. He asked Mr A if he was available for a meeting in person or over the phone straight away. Mr A said he did not understand why Mr C wanted an urgent meeting and Mr C told him that he needed to have a meeting with him as soon as possible to tell him B Ltd's decision. Mr A told Mr C that he was expecting a visitor shortly and therefore could not meet with him in person and asked that he tell him what he had to say over the telephone. Mr C told Mr A that he was being dismissed, effective immediately, for not filling out the application form correctly by not mentioning the criminal offences."

B Ltd subsequently confirmed the decision to dismiss in writing. B paid Mr A one month's pay in lieu of notice.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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During the course of the investigative meeting B Ltd gave evidence that:

"Mr A's failure to disclose his convictions meant that he had lost trust and confidence in Mr A. In addition, the nature of the convictions was greatly at odds with the values and culture [B Ltd] promotes and supports which are family values and culture. Mr C did not feel that B Ltd could continue to engage Mr A in a senior role with a great amount of autonomy, with control, authority and influence over a number of staff and with a great deal of public contact."

The Authority referred to Employment Court determinations which had dealt with similar situations:

1. **Tai v. Robinson (t/a Coronation Rest Home)** - in that case a caregiver was justifiably dismissed for declaring that she had no criminal convictions when she had been twice convicted of assault. In this case Employment Judge Shaw held:

"... was a legitimate question to be asked and, in light of the nature of the defendants' business, one that was necessary for the purpose. Staff in rest homes deal with a very vulnerable section of society. Apart from their professional qualifications, staff must also be absolutely trustworthy and free from any tendency to violent behaviour. It is reasonable to expect that a revelation of a prior conviction for dishonesty or violence would be very influential in the decision of whether to employ or not. ..."

2. **Murray v. AG [2002] 1 ERNZ 284** - this was a case where during the early stages of their employment with the IRD Mr and Mrs Murray had pleaded guilty to benefit fraud charges. In that case the Court held:

"The difficulty for them was and is that they underwent convictions and, on their own admissions, have been guilty of behaviour which they knew disqualified them from their employment. These were the very things of which they were informed in advance they must not be guilty of if they wanted to come and work for the defendant. One of the generally unacceptable convictions listed as such as a conviction under s 127 of the Social Security Act ... The plaintiffs pleaded guilty to this very offence (and to fraud under the [Crimes Act 1961](#))."

The Authority noted that in both the **Murray** and the **Tai** case the types of criminal offending committed by the employee were directly relevant to the type of work done by them.

The Authority distinguished the facts in the above Employment Court determinations from the facts before the Authority on this occasion:

"[46] In contrast:

- (a) B Ltd did not undertake a criminal record check;*
- (b) did not make the retention of Mr A's employment conditional on any subsequently discovered false information given by him;*
- (c) the convictions were uncovered after six years of otherwise satisfactory, even good, service; and*
- (d) the convictions were between 15 and 17 years old when Mr A filled in the application form and were over 20 years old when they were discovered."*

In reaching the decision that the dismissal was unjustified the Authority noted:

"[48] It is clear that the nature of Mr A's criminal offending is abhorrent to most people in society, and there can be no criticism of Mr C or Mr D being horrified and shocked when they discovered that Mr A, whom B Ltd had employed for about 12.5 years by then, had committed such offences."

However the Authority reached the view that there was not a "sufficient nexus" between the employee's out of work conduct and his employment:

"[50] . . . it is difficult to conclude that the nature of Mr A's convictions was intrinsically related to his employment and made it less likely his employer could rely upon him to undertake his duties well and diligently without risk of a repetition of his criminal behaviour. If the convictions had been ones for dishonesty there would have been a clear and direct link to the kind of work Mr A undertook for B Ltd. Even in those circumstances I consider the period of time that had passed since the last conviction and Mr A's good work record with B Ltd could have been taken into account and weighed against the revelation of Mr A's historical offending. However, Mr A's offending was not of a nature intrinsically related to his work for B Ltd and was not of a kind that would make it less likely he could undertake his duties in a trustworthy manner."

In relation to B Ltd's assertions that MR A concealing his convictions had undermined the requisite trust and confidence the Authority held:

"[52] However, despite concealing his convictions Mr A had worked diligently from 2007 until 2012 when he was promoted. In the time he was engaged in that elevated role his branch had performed well. There had been no complaints about Mr A and there had been no need for any disciplinary action in the period between 2007 and the discovery of his convictions in April 2013. There was no suggestion of his having been dishonest in any way other than concealing his previous convictions."

"[54] A fair and reasonable employer could not have considered that Mr A's historical offending would have an impact or a potential impact on B Ltd's business, or that Mr A's offending conduct was incompatible with the proper discharge of his duties, or that it could impact on B Ltd's obligations to other employees."

The Authority also determined that the process followed was procedurally flawed and awarded the penalties outlined above.

It will therefore be essential that before dismissing in circumstances such as this, careful consideration is given as to whether there is a sufficient nexus between the undisclosed criminal convictions and the nature of the role occupied by the employee and further, whether the employee's subsequent employment history with the employer is such that you could not properly rely upon these convictions to dismiss.