THE ADVOCATE

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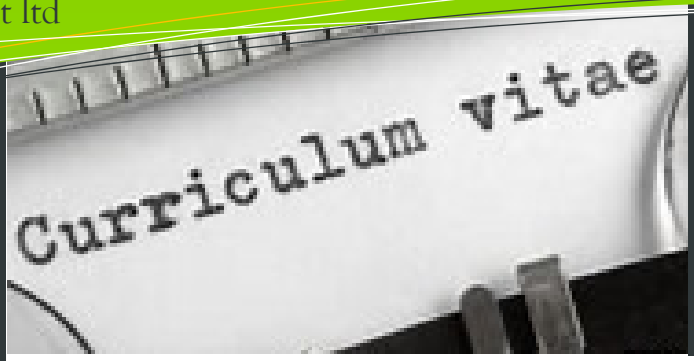
a regular newsletter for clients of mcphail gibson & zwart

ISSUE 271

October 2017



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
- Employment Relations Strategies
- Training
- Monthly newsletter

Sacked Before Starting

A recent Employment Relations Authority case, ***PCA v. David Orsbourn Medical Services Limited t/a Enhanceskin*** [2017] NZERA Chch 123 (12 July 2017) proved an expensive lesson for the employer, Enhanceskin, costing it over $7,500.00 in circumstances where the employee never actually commenced work with it.

The employee, '*PCA'* (her real name was suppressed due to historical issues) was subject to allegations of theft in a previous employment, but the theft charges were dismissed in the District Court. She was working as an administrator for "*WSE*" when she applied for a role with Enhanceskin on 14 August 2015. She was initially interviewed by an employment agency, was shortlisted, and on 28 August she was interviewed by the owners of Enhanceskin, Dr Orsbourn and Mrs Orsbourn. On 31 August she was told that she was the preferred candidate, and she completed an online Police Vetting check the following day.

On 1 September, she collected the offer of employment from Enhanceskin, and upon receiving the draft employment agreement on 2 September, she resigned from her role at WSE.

When PCA attended the premises of Enhanceskin's agent to sign the employment agreement, the receptionist recognised her and told Dr Orsbourn that she believed there was an issue with PCA's employment with an earlier employer, involving cash going missing and criminal charges.

Dr Orsbourn investigated and was able to establish that PCA had been employed with "*KWR*" for a short period of time and that something had gone on in her employment. He also established that PCA had not included KWR in her CV as part of her employment history.

Dr Orsbourn was concerned that PCA had lied to him about her employment history, and misled him over her suitability for the role at Enhanceskin as it was a sole charge role involving cash handling. He therefore contacted the employment agency, and after discussion, the agency agreed to handle the situation.

The agency contacted PCA on 11 September and withdrew the offer of employment, and subsequently met her on 16 September to explain the reason for the offer withdrawal, which it later confirmed in writing. PCA did not accept an offer by Dr Orsbourn and his wife to meet to discuss the situation.

The Employment Relations Authority decided that the issues to be addressed were:

"(a) Was PCA an employee notwithstanding that she had not commenced work for Enhanceskin;

(b) If PCA was an employee, was she dismissed, which includes considering whether any applicable employment agreement could be cancelled under the Contractual Remedies Act 1979;

(c) If PCA was dismissed, was the dismissal justified, which includes considering the procedure by which the dismissal was effected, the substantive reason for the dismissal and whether PCA is estopped from claiming the dismissal was unjustified;

(d) If the dismissal was unjustified, what remedies, if any, is PCA entitled to; and

(e) If PCA is entitled to remedies, did she contribute to her grievance in such a way that the remedies should be reduced?"

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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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On the first issue, the Authority held that PCA was an employee based on the definition of "*employee*" in the Employment Relations Act, which includes a "*person intending to work*":

"[26] I am satisfied that based upon s 6 of the Act PCA was an employee. Enhanceskin had made an offer of employment, which PCA accepted by signing an employment agreement. The fact that she had not commenced employment does not change this; PCA was a person intending to work and therefore an employee." The Authority went on to hold that as there was a concluded offer and acceptance, Enhanceskin was not entitled to withdraw the offer, and that the purported withdrawal of the offer constituted a dismissal.

In examining whether that dismissal was justified, the Authority said:

"[32] In summary Enhanceskin must show that it followed a fair procedure in coming to its decision to dismiss, including providing information to PCA, giving her an opportunity to respond to that information and considering any response before deciding to dismiss. Enhanceskin must also show that the decision to dismiss was substantively justified i.e. it is a decision that fair and reasonable employer could have come to in all of the circumstances.

[33] Clearly, Enhanceskin failed to meet the procedural aspects of a fair dismissal. And I am satisfied that the decision to dismiss was not substantively justified."

PCA explained to the Authority that she left out details of her employment with KWR because she could not see any point in listing it and only included "relevant employment experience", however the Authority said:

"[36] . . . It seems to me that it is more likely that she chose to exclude it because she thought it might be unfairly prejudicial to her employment prospects if a prospective employer became aware of the circumstances pertaining to the end of her employment at KWR.

[37] This was arguably just a decision not to disclose information that might have influenced an employer's decision to employ; information PCA believed could lead to an unfair and unwarranted influence."

Despite this, the Authority went on to find:

"[40] In short, because Enhanceskin did not carry out a fair process and understand properly: (i) what happened during the period of employment that was not disclosed by PCA; (ii) why she chose not to disclose it; and (iii) what she had to say about Dr Orsbourn's conclusions that she had lied and misled him and could not be trusted in a sole charge role, it cannot conclude that the dismissal was substantively justified."

In the result, PCA was awarded $6,000.00 compensation and $1684.80 lost remuneration, after a reduction of 25% for her own contributory conduct:

"[68] In this case I consider that given that PCA was applying for and accepting a position of trust — a sole charge position that involved handling money — it was important that Enhanceskin could trust her and be satisfied that she was honest. A decision to hide information that cast doubt on this trust and honesty causes some concern. Not because the missing employment history confirms that PCA was dishonest or could not be trusted as it does not do this; PCA was, after all, not convicted of theft and not dismissed for theft. Rather it is the decision not to disclose that casts doubt on PCA's honesty and trustworthiness. She was prepared to hide or ignore a matter rather than "front foot it", as counsel for Enhanceskin described it, and this does not reflect well on her."

"[70] It is also relevant that PCA signed the employment agreement with a declaration stating that the information she provided to Enhanceskin in connection with her appointment was accurate and not misleading. The failure to disclose the period of employment with KWR meant the information provided was not accurate."

In circumstances where trust and confidence were an important aspect of the employment relationship, and there was a good faith duty on PCA not to mislead or deceive her employer, the 25% reduction in remedies seems paltry. Nevertheless, there were other ways of handling this matter which could have avoided the costly outcome. There is a suggestion in the decision that the contract could have been cancelled under the Contractual Remedies Act [now the Contract and Common Law Act 2017] on the basis of misrepresentation. This may be risky however, as there is still a possibility that such a cancellation could be treated as a dismissal under the Employment Relations Act.

A proper investigation and procedurally fair dismissal process may have resulted in a different outcome entirely. Further, if the employee had actually commenced working, and was subject to a 90 day trial period, any dismissal for misleading her employer would not have been challengeable.

The option taken to allow the recruitment agency to terminate was unwise. The responsibility for the decision and process of dismissal ultimately rests with the employer.

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