

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 198
5293008

BETWEEN MARIA CAMPUZANO
 Applicant

AND WESTERN BAY DENTAL
 CARE LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: K Single, Advocate for Applicant
 M Beech and K McLeish, Counsel for Respondent

Investigation Meeting: 16 December 2010 at Tauranga

Submissions Received: 20 December 2010 and 24 January 2011 for the
 Respondent
 6 January 2011 for the Applicant

Determination: 12 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Campuzano, claims that she was unjustifiably dismissed on 16th November 2009. Ms Campuzano asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of wages and compensation of \$10,000. The respondent, Western Bay Dental Care Limited, says that the dismissal was justified, due to an irreconcilable breakdown in trust and confidence pertaining to the conduct of Ms Campuzano.

Background Facts and Evidence

[2] Western Bay Dental Care Limited is a small dental practice in Katikati. The Principal Dentist (and Director) is Ms Anne-Marie Fouché. Her partner, Mr Beat

Murer, is the Practice Manager. There is also a dental assistant and at the material times, there were two receptionists employed on a job-share basis. One of the receptionists was Ms Campuzano. She commenced her employment on 26th August 2008. The other receptionist was Ms Michele Boylan. She commenced her employment on 9th March 2009. There was also a relieving dentist engaged as an independent contractor.

[3] On Monday, 29th June 2009, Mr Murer arrived at the practice to find that both Ms Campuzano and Ms Boylan were at work as evidenced by their cars being present. The evidence of Mr Murer is that he was surprised as he was aware that the two receptionists worked on a job-share basis and Ms Boylan was rostered to work that day. Upon arriving at the front desk of the practice, Mr Murer heard a raised voice from Ms Campuzano and he says that he then saw her: "... waving her finger right in Michele's face almost touching her nose" with Ms Boylan "backed into the cupboard." It seems that Ms Campuzano was upset that Ms Boylan was rostered to work that day. Apparently, Ms Campuzano believed the roster was wrong and had strongly taken issue with Ms Boylan about her presence on that day, albeit the roster showed that Ms Boylan was to work. Ms Boylan subsequently went home and did not work that day.

The verbal warning of 10th July 2009

[4] On 10th July 2009, Mr Murer had a performance management meeting with Ms Campuzano. The evidence of Mr Murer is that, after praising the quality of Ms Campuzano's work and informing her of a wage increase, he conveyed that he had to address the incident that had occurred on 29th June involving Ms Boylan. He went on to tell Ms Campuzano that her behaviour was not acceptable and that staff were to be treated with respect. Mr Murer says that he said to Ms Campuzano: "You have to take this as a verbal warning." After the meeting Mr Murer made a file note of the warning for Ms Campuzano's personal record but a copy was not given to her.

[5] About three weeks later, Ms Campuzano approached Mr Murer and told him that she thought that it was unfair that Ms Boylan had received the same pay increase as her. However, upon Mr Murer giving an explanation as to why Ms Boylan received the same pay rise, Ms Campuzano informed Mr Murer that she was "relieved" and gave him a hug. However, the evidence of Ms Fouché is that "matters" between Ms

Campuzano and Ms Boylan “continued to deteriorate” to a point in August 2009, where Ms Campuzano refused an instruction from Ms Fouché to train Ms Boylan regarding “ACC / DHB / WINZ patients.” The evidence of Ms Fouché is that Ms Campuzano refused to carry out the training but also informed that if Ms Boylan was to be involved with these patients then she [Ms Campuzano] would not perform “those tasks” any more. Ms Fouché says that because the practice is small it is important that staff can carry out all duties.

[6] The further evidence of Ms Fouché is that on 31st August 2009, Ms Campuzano proposed that some changes could be made to the management of the practice. On the request of Ms Fouché Ms Campuzano subsequently put her suggestions in writing. Ms Fouché responded in writing to Ms Campuzano’s suggestions on 4th September 2009 and while she did not accept the proposals, she met with Ms Campuzano later that day to discuss them. Ms Campuzano continued to have issues regarding Ms Boylan, including that she was on the same pay rate. Ms Fouché gave assurances that some matters raised by Ms Campuzano had already been managed and others would be investigated. A file note made by Ms Fouché after the meeting records what was discussed and the fact that Ms Campuzano offered her written resignation¹ and then retracted it. The evidence of Ms Fouché is that she believes that Ms Campuzano had decided, either in August or September 2009, that she was going to resign. Ms Fouché discovered that Ms Campuzano had requested references from Mr Ivan Gird, the relieving contract dentist, and Ms Irena Comer, the dental assistant. The references are respectively dated 7th September and 22nd September 2009.

[7] The evidence of Ms Campuzano is that she put forward her suggestions to Ms Fouché because she understood that Ms Boylan “had tendered her resignation” and Ms Campuzano felt that she could be utilised better in the management of the practice. It appears that Ms Boylan retracted her resignation. Ms Boylan provided a statement setting out a number of complaints about the behaviour of Ms Campuzano towards her and citing Ms Campuzano’s actions as the primary factor that brought about the resignation. But this statement is undated and as Ms Boylan did not give evidence to the Authority, it is difficult to place in into an appropriate context, or

¹ The evidence is that Ms Campuzano gave Ms Fouché a sealed envelope - it was presumed to have contained a resignation – but Ms Campuzano took the envelope back before Ms Fouché could open it. At the investigation meeting, Ms Campuzano confirmed that the envelope did contain her resignation.

assign any particular weight to its content but it is established that Ms Boylan was going to resign.

[8] After the meeting on 4th September, Ms Fouché interviewed other staff about Ms Campuzano's "behaviour." Ms Fouché says that she discovered that a notice board that was used by Ms Campuzano and Ms Boylan to leave messages for each other (as to administrative matters, given their job-share arrangement), was being used by Ms Campuzano to make negative comments about Ms Boylan.

[9] Another meeting between Ms Fouché and Ms Campuzano took place on 9th September 2009. The evidence of Ms Campuzano is that Ms Fouché informed her that Ms Boylan had resigned because of Ms Campuzano and that Ms Fouché: "proceeded to read off a list of allegations from Michele." The further evidence of Ms Campuzano is that:

Anne-Marie went on to tell me that she had sought out feedback about me from her 'colleagues' and "everyone" at the practice had said that I was hard to work with, that they didn't feel comfortable around me, and that I "snap" at everyone and don't support them." Ms Campuzano also says that Ms Fouché told her that: "No one can tell you anything."

[10] Ms Campuzano says that she was: "devastated by her accusatory tirade and indicated that I would resign because if everyone says I am difficult to work with, then I was not helping her practice one bit by continuing to work there. I said I would leave a resignation letter for her." The evidence of Ms Fouché is that Ms Campuzano began typing what Ms Fouché assumed was going to a resignation but because she had a patient to attend to, she left at this point.

[11] Ms Fouché made a file note relating to the meeting. She records:

The objective of the meeting was to counsel Maria on the importance of good teamwork to achieve success for the business, and discuss her continued behaviour towards Michelle that was detrimental to achieving this goal.

- She had also received a prior warning about this same behaviour by Beat and now had to be issued a written warning. She did not deny this.
- It was also an opportunity for Maria to explain her behaviour and apologise.
- Maria offered no valid explanation and denied allegations Anne-Marie read from Michele's list.
- However, when confronted with the fact that other staff confirmed her angry outburst and comments, she backed down, admitted the incidents but argued about the semantics.

- She then refused to continue the meeting, saying “save your breath, I’m resigning.”²

The written warning dated 9th September 2009

[12] Ms Fouché issued Ms Campuzano with a written warning contained in a letter dated 9th September 2009, but it appears that it was given to Ms Campuzano the following day. The letter covers about a page and a half but in summary, Ms Campuzano was requested to:

... desist with the following unacceptable behaviour:

Unprovoked temper flare-ups resulting in

- Snide and derogatory remarks
- Raised voice and authoritarian manner to others
- Finger pointing

Ms Campuzano was also reminded of the verbal warning relating to the incident in June 2009 and of the incidents pertaining to Ms Boylan that were discussed at the meeting on 9th September 2009. Ms Campuzano was informed that:

You admit that you have a quick temper but your excuse is that it is “over just like that” (snapping your fingers). However, that is not acceptable, because it affects the dignity and self esteem of others if you lash out at them. Should this, or related behaviour continue we will be left with no choice but to take further disciplinary action, which may lead to termination of your employment. We will review this matter on 9 December 2009.

The letter then records that:

When our meeting had progressed to a point where I told you the warning had to be issued and I was preparing to continue, you gesticulated and told me to “save my breath” as you were going to resign. However, you have not and I will list here other actions which I would like you to stop doing. I also ask you to not engage in

- Territorial behaviour showing an unwillingness to freely share information with colleagues
- Criticism of management

In regard to the latter bullet point, Ms Campuzano was informed:

Also your attitude to management has been challenging and accusatory. We have been accused of being casual, unfair and of not communicating in the practice, which is not based on fact but your own perception, and I would like you to not make comments like that in future.

The response to the warning

[13] The evidence of Ms Campuzano is that when she received the written warning she decided not to resign as “it could add legitimacy to the allegations.” Ms

² Under questioning from Mr Beech at the investigation meeting, Ms Campuzano denied that she said “save your breath” but accepted that she did say she would resign.

Campuzano prepared a long (three pages) and graphic written response (dated 8th October 2009) to the warning. Due to the length of the letter it is not practicable to reproduce it here but given that the reason for the dismissal of Ms Campuzano is that there was an irreconcilable breakdown in trust and confidence, it is appropriate to reproduce some extracts from the response as an indication of why Ms Fouché had serious concerns about maintaining the employment relationship. The relevant extracts are:

- (a) Upon reading through your written warning, it became very apparent that you have a personality conflict with me. You have chosen to escalate this personality conflict into an alleged issue with my workplace behaviour. Preceding the issuance of the written warning, I have witnessed what I believe to be a purposeful effort by you to intimidate humiliate, harass and lower my self-esteem, not only as an employee, but as a human being. Your “written warning” serves to confirm what I have felt that I have become a scapegoat for another employee, for you, or for both of you. Make no mistake: within the walls of your practice, it is I who have been bullied and maligned.
- (b) This classic bullying tactic is tantamount to character assassination and makes the recipient feel a sense of betrayal and isolation from the other employees. It is very mean-spirited and causes distrust and loss of morale. Making a person feel undervalued and unappreciated by the entire group of people in any organisation is cruel and unhealthy. In soliciting negative feedback about me from other employees, you have now come to an erroneous conclusion that I do not get along with other persons in the practice. The irony is that I have been assured by others in the practice that we have very good reciprocal working relationships, which contradicts your effort to convince me otherwise.³ Additionally, there has been and continues to be an obvious lack of kindness in dealing with me, something which I have observed is not the case with other employees.
- (c) It is necessary that I ask that you cease actions which appear to be confrontational and mean-spirited. I believe strongly that you have shown a lack of sensitivity to my sense and well being.
- (d) Fortunately, as soon as it became apparent that you had a personal dislike for me which could threaten my job, I began to take extensive and detailed notes of relevant and revealing work situations which had taken place. I have retained these notes for now, which may become necessary some day to protect my personal and professional reputation which has been compromised and under attack. I will leave it to you to deem if it is necessary that I elaborate further about the tacit unfairness of this entire exercise that you have put us through.

[14] Ms Campuzano also makes a number of submissions about why she believed the warning was unjustified. She also accused Ms Fouché of acting with “vehemence” because Ms Campuzano was a threat to her authority. This appears to be linked to the proposals that Ms Campuzano put forward regarding the management of the practice.

³ This is in reference to the written warning that Ms Campuzano says was “based on unsubstantiated accusations.”

Ms Campuzano and Ms Fouché met on 14th October 2009 and Ms Campuzano presented her letter. Apparently, Ms Fouché indicated that she was too tired to read such a long document and she requested that Ms Campuzano email the letter to her so that she could read it at home and then talk to her on Friday, 16th October. Ms Fouché says that after reading the first few paragraphs of the letter it was clear to her that it: “constituted an attack on me and needed careful consideration.” The evidence of Ms Fouché is that most of the claims made by Ms Campuzano are “simply untrue” and that Ms Campuzano had portrayed Ms Fouché as her “tormentor” and herself as the “victim.” Ms Fouché says that she absolutely denies that she behaved in the way that Ms Campuzano alleges. Subsequently, Ms Fouché sought to have a meeting with Ms Campuzano to discuss the issues she had raised but due to other commitments that Ms Fouché had, a meeting did not occur until 30th October 2009. Ms Fouché says that she was “very clear” that the meeting was not of a disciplinary nature but that “if matters did not improve” she may have to consider other action in the future.

The meeting on 30th October 2009

[15] Ms Campuzano was accompanied by her partner, Mr Jim Bartee. Ms Fouché was accompanied by Mr Murer. Ms Fouché prepared a file note following the meeting. There is some conflict in the evidence of what was said overall but the content of the file note appears to be a reasonable summary of the substance of the meeting. The file note records that:

The objective of this meeting was to try and find a way forward after Maria’s letter dated 8 October 2009.

- Anne-Marie read a synopsis of events leading up to receiving Maria’s letter.
- Anne-Marie cleared up Maria’s incorrect statement that she was being disciplined for “problems with me (Maria) getting along with every person in your practice,” assuring her that this was never said or intended.
- Maria denied the issuing of the verbal warning, even with Beat recapping their discussion on 10 July 2009.
- Jim asked for clarification on “finger pointing.” Anne-Marie demonstrated and Maria denied it. Beat said that he had witnessed the finger pointing.
- Maria asked what other instances of “inappropriate behaviour” had occurred.
- Maria clarified what she meant in her letter about herself being bullied. She said it was the disciplinary action taken against her.
- Maria was made aware that the allegations in her letter were serious and undermined the employment relationship. She was asked to withdraw these allegations. She refused adamantly and was supported in this by Jim.
- Maria was then informed that this led to a complete breakdown in trust and confidence. She agreed and nodded and so did Jim.

[16] Ms Fouché says that she also assured Ms Campuzano that she was not being “singled out” and that the goals for the practice were to: “create a happy workplace

with above average facilities and wages.” The further evidence of Ms Fouché that instead of responding to the issues she had tabled:

Mr Bartee stood up and said words to the effect that the divide between the parties was so great that there was no point in continuing. Maria and Mr Bartee refused to enter into any further discussion and Mr Bartee stated that all further discussion was to be conducted in writing. He concluded by quoting Churchill at us saying, “*we will fight you on the beaches, we will fight you in the air, we will never surrender.*”

[17] Ms Campuzano and Mr Bartee deny that the Churchill quote was made. Mr Bartee says that: “those are combat words” and that he would never say that as he is; “not that kind of a person.” However, I find the evidence of Ms Fouché to be more probable on this matter. Overall I have found the evidence of Ms Fouché to be reliable and I conclude that it is unlikely that she would fabricate such evidence.

[18] Following the meeting on 30th October 2009, Ms Fouché wrote to Ms Campuzano on 3rd November 2009. I conclude that this comprehensive letter can be taken as a reasonable summary and record of the state of the employment relationship at that point hence it is worthy of reproduction in full:

Following our meeting with you on Friday 30 October 2009, it is clear that there is now a serious problem in the employment relationship between you and Western Bay Dental Care. Since the commencement of your employment, it appears that you have had difficulties building collegial relationships with other staff members, which is crucial in a practice such as ours. For example:

1. When you commenced employment you were offered assistance from Irena in the use of computer software, making of appointments and questions to be asked of clients when they call, because Irena had more than two years of dental support and had done reception duty using the same software. You took exception to what Irena was doing and asked her to leave as you felt she was trying to show you how to do your job and that there were too many bosses telling you what to do. You later reported the same incident to me, saying you “got a feeling” that Irena was trying to boss you around.
2. You then had verbal altercations with Michele Boylan, the other receptionist. As a result, Beat Murer, practice manager, spoke to you about your behaviour on 10 July 2009, and told you to consider that discussion to be a verbal warning.
3. The receptionists are expected to take responsibility for housekeeping outside of the surgeries and sterilizing room. It was reported to me that you objected to this and made a remark to another employee that I am “so messy.” This is an inappropriate remark to make about your employer. It also displays an unwillingness to fulfil the tasks management requires from you.
4. There was also an incident in the lunchroom when you gave a new professional staff member a forceful lecture on putting his dishes in the dishwasher, in the presence of other staff. This shows a lack of tact and

judgement on your part (which are essential as a receptionist) and is not conducive to welcoming a new staff member to the practice and building strong relationships.

5. Another incident occurred where you came into my surgery between patients to ask a question. I responded to your question, but must have misunderstood exactly what you wanted, as you then raised your voice, spread your hands and told me to "LISTEN, LISTEN!" I consider this to be a most inappropriate way to react given the circumstances, displaying lack of tolerance and respect. Irena (who was present), and I were shocked.
6. There were then several other exchanges with Michele, which resulted in Michele tendering he resignation and telling me that your behaviour towards her was a decisive factor in her decision to leave.

As a result, I felt that I had no option but to consider a written warning. I attempted to meet to discuss this with you on 9 September 2009, but you ended the meeting saying that you wished to resign. This was then followed by an email on 10 September stating that you wished to be given the warning, which I duly provided to you.

You then wrote to me on 8 October 2009. Your letter contained a number of serious allegations about my treatment of you. I wished to meet with you to discuss the allegations, although a meeting had to be scheduled around the demands of the practice. The meeting was held on 30 October 2009.

At this meeting, you did not accept that your conduct and behaviour towards colleagues was unsatisfactory, and stood by the allegations in your letter of 8 October. You would not engage further and your partner stated that he required all further discussion to be conducted in writing. As the meeting ended before we could discuss certain matters, there are several points raised in your letter of 8 October which I would like to respond to:

1. I do not accept that there has been a failure to communicate with you. As a small practice communication is informal and you are expected to adapt to that.
2. I expect staff members to work as a team and to be respectful, courteous and supportive of each other. The fact that your behaviour has caused another employee to proffer her resignation strongly suggests that the standards have not been adhered to.
3. Matters relating to other staff are confidential. Specifically, their personal circumstances are private and should be respected as such. Any issues arising out of their work may be raised with management, but how it is dealt with after that is confidential between management and the employee.

Maria, the situation has now become very serious. You have alleged that I have bullied you, which I refute absolutely, and have demanded that we communicate in writing. You have however, continued to attend work.

Western Bay Dental Care is a small practice and this situation is potentially very disruptive. I am concerned that it will affect other staff and patients. I believe it is also completely untenable to try and resolve the issues by correspondence. Hence my preference for a meeting or mediation.

You will recall that when you suggested mediation I had already made enquiries and was ready to attend, however mediation was not available until December and given how stressful the situation is for all, Beat and I attempted to resolve issues at our meeting of 30 October 2009. I am extremely disappointed that you did not take that opportunity to constructively discuss the issues with us.

As a result, I am now considering terminating your employment on the basis that there has been a complete break-down in trust and confidence between you and Western Bay Dental Care. You have made it clear that you are unhappy with my treatment of you and while I do not accept your allegations, your refusal to discuss them further means we have been unable to resolve our respective concerns. I equally have concerns about your behaviour, which has not been addressed.

Before I make any final decision, however, I invite you to make any comment you may wish to about the matters I have set out on the first page of this letter and the proposal to terminate your employment. You may wish to seek independent advice before replying and I encourage you to do so. Please provide any reply you wish to make by 5pm, Friday 6 November 2009.

[19] Ms Campuzano sought an extension of time to obtain advice, and then present a response, which she did on 13th November; via a comprehensive letter dated 12th November 2009. Ms Campuzano addressed the issues that were raised by Ms Fouché (as above). Essentially, Ms Campuzano did not accept the perception of Ms Fouché regarding the various issues and gave an explanation of her perception of the various matters. Ms Campuzano concluded her letter:

We have tried to work this out between ourselves but there appear to be some ongoing issues. It is my view that these issues can be resolved. I do not believe that there has been a complete breakdown of trust between the parties. Nor do I believe my actions are such that they constitute serious misconduct resulting in the termination of my employment. For this reason, I recommend we pursue mediation through the Department of Labour as the next course of action for a resolution. I am willing to arrange for this mediation; I understand that if there is an ongoing relationship, we are likely to get an urgent mediation. Can you please let me know if you agree to attend mediation with regard to this matter.

[20] The evidence of Ms Fouché is that Ms Campuzano's "analysis and explanations is unwarranted as these were not the basis of my concerns." In summary, Ms Fouché concluded that she found the actions of Ms Campuzano "out of line" with her philosophy for her business and that Ms Campuzano was not prepared to accept that and change her behaviour. Ms Fouché says that: "I had simply reached the point where I could not continue to deal with Maria's presence in the business." Via a letter dated 16th November 2009, Ms Fouché informed Ms Campuzano that her employment was terminated; effective immediately with two weeks' payment in lieu of notice. The germane content of the dismissal letter is:

Furthermore, you have disparaged my business and my management style, frequently comparing it unfavourably to your previous corporate environment. Rather than taking direction from management, you have met my concerns by attacking me, my integrity and honesty, which fundamentally undermines my trust and confidence in you. Your poor relationships with other staff members are also well documented.

And further:

I therefore consider that an ongoing employment relationship is simply untenable. Accordingly, I have now decided to terminate your employment on the basis that there has been a complete break-down in trust and confidence between you and Western Bay Dental Care.

Legal Analysis and Conclusions

[21] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal was justifiable (or not), the Authority is required to consider on an objective basis, 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.

[22] In regard to the law relating to justification for a dismissal it is well established that a fundamental term of an employment contract, such as Ms Campuzano's, is that trust and confidence exists and is reciprocal.⁴ As was held in *Reid*, it will be an unusual and rare case in which an employer may justify dismissal of an employee because of an irreconcilable breakdown of trust and confidence in the employment relationship, rather than on the usual grounds of serious misconduct. However, upon a close analysis of the overall circumstances pertaining to the employment relationship between Ms Campuzano and Ms Fouché, I am satisfied that this is such a case. I come to this conclusion on the basis of assessing the following events:⁵

(a) Firstly, Ms Campuzano received a verbal warning because of her behaviour towards Ms Boylan on 29th June 2009. The warning was not raised with, or given to, Ms Campuzano until 10th July 2009, during a performance review and hence was somewhat belated. And while a file note of the warning was made by Mr Murer, best practice would have been to have given a copy to Ms Campuzano too. Nonetheless, and contrary to the view consistently espoused by Ms Campuzano, I find that this was a valid verbal warning given for good cause. The necessity for the warning was also indicative of a behavioural trait that came into subsequent consideration.

(b) Then a written warning dated 9th September 2009 was issued to Ms Campuzano. This followed an investigation by Ms Fouché into the actions of Ms Campuzano regarding her interpersonal relationships with other staff, particularly Ms

⁴ *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250.

⁵ The details of which are set out in the overall evidence.

Boylan who had tendered her resignation citing the difficulties with Ms Campuzano as the primary reason for resigning. At the meeting that took place on 9th September, following Ms Fouché expressing her concerns about Ms Campuzano's attitude towards other people, the reaction of Ms Campuzano was to tell Ms Fouché to save her breath because she was going to resign (but did not).

- (c) Ms Campuzano's response⁶ to the warning was to:
- (i) Accuse Ms Fouché of having a "personality conflict" with her and escalating this alleged conflict by taking issue with her workplace behaviour.
 - (ii) Allege that Ms Fouché had engaged in a "purposeful effort" to "intimidate, humiliate, harass" and lower her self esteem, "not only as an employee but also as a human being."
 - (iii) Allege that she had been "bullied and maligned" and that the alleged bullying was "tantamount to character assassination" and that she felt "a sense of betrayal and isolation" from other employees.
 - (iv) Allude to Ms Fouché as being "mean spirited" and causing "distrust and loss of morale."
 - (v) Allege that Ms Fouché had made her feel "undervalued and unappreciated" by the group and that there had been "an obvious lack of kindness" in dealing with her.
 - (vi) Request that Ms Fouché cease actions that appeared to be "confrontational and mean-spirited."
 - (vii) Allege that Ms Fouché had shown a "lack of sensitivity" to her well being.
 - (viii) Allege that it was apparent that Ms Fouché had a "personal dislike" for her and that her personal and professional reputation had "been compromised and under attack."
 - (viii) Allege that Ms Fouché was acting with "vehemence" because Ms Campuzano was a threat to her authority.
- (d) A meeting took place on 30th October 2009, with the objective (according to Ms Fouché) of trying to "find a way forward." In addition to discussing Ms Campuzano's issues, she was made aware that the above allegations were serious and that they undermined the employment relationship. Upon being asked to withdraw the allegations she refused "adamantly" according to Ms Fouché, (and I accept her evidence). I also accept that Mr Bartee indicated that there was no point in continuing

⁶ In the letter dated 8th October 2009.

with the discussions because of the division between the parties. I also accept Mr Bartee informed that all further discussion was to be in writing and that he quoted Winston Churchill as set out earlier in this determination.⁷

(e) Given the overall attitude presented by Ms Campuzano, and Mr Bartee on her behalf, Ms Fouché came to the conclusion that an ongoing employment relationship was untenable and the employment of Ms Campuzano was terminated on the grounds that there had been a “complete breakdown in trust and confidence.”

[23] Given the totality of the circumstances, in particular the potency of the allegations made against Ms Fouché by Ms Campuzano, her refusal to retract or resile from them and the small scale of the dental practice which required good interpersonal relationships, I conclude Ms Campuzano created a situation whereby it was impossible for the employment relationship to continue and that Ms Fouché had little choice but to terminate the employment of Ms Campuzano.

Is there anything that made the dismissal unjustified?

[24] I note that Ms Campuzano had proposed that mediation should be attempted as a course of action to resolve matters between her and Ms Fouché. It also seems that earlier in the chapter of events, Ms Fouché had proposed that mediation should be attempted but it could not be arranged promptly at that time. Normally when both parties are willing to attempt mediation then one would expect that to occur before a dismissal is contemplated. Unfortunately, the employment relationship was, in my view (even with the involvement of skilled mediator) irretrievable, by the time that Ms Campuzano proposed this course. Also, it is clear that Ms Campuzano had concluded some time before her dismissal that other employment options should be contemplated, as manifested by her seeking references from two practice members in September 2009, and her intimation on two occasions that she would resign rather than engage in further conflict with Ms Fouché.

[25] I have also considered the circumstances pertaining to Ms Campuzano receiving the written warning dated 9th September 2009. It appears that the meeting on 9th September began on the basis that Ms Campuzano was to be “counselled” by Ms

⁷ At [16].

Fouché on the “importance of good team work to achieve success for the business” but then due to Ms Campuzano failing to acknowledge the matters that were raised with her, a written warning was issued which of course was a disciplinary outcome that neither party appear to have anticipated. Had they done so, it would be expected that Ms Campuzano should have been forewarned that this was a possibility and that she should have a support person or representative with her at the meeting. However, it appears that the situation was quite fluid and spontaneously changing almost on a daily basis and I suspect that neither Ms Fouché nor Ms Campuzano were very certain about where the relationship was going to end up. In the round, while I have some reservations about the overall fairness of the circumstances regarding the issuing of the written warning, it has not been challenged in any meaningful manner and nor does its existence appear to have been a substantive factor in the decision to terminate the employment of Ms Campuzano. Rather, that decision appears to have been taken after a consideration of the cumulative events pertaining to the behaviour of Ms Campuzano and in particular, her vigorous allegations against Ms Fouché from which Ms Campuzano was not prepared to resile.⁸ Regrettably, I cannot help but conclude that Ms Campuzano had largely abandoned the possibility of constructive discussion and/or giving consideration to her employer’s viewpoint, and possible compromise, or anything else that might have retrieved the relationship. Indeed, it seems to me that both parties had reached a conclusion that there was little of substance left in the employment relationship that could be continued with.

[26] As was held by Palmer J in *Buxton v Five Star Beef Limited*:⁹

It is well established that sustained avoidable incompatibility by a particular worker of his or her colleagues – as the case may be – at a particular place of employment may compromise justifiable grounds for dismissal of the disaffected worker.

[27] In summary, the circumstances cannot be put better than the established (and often quoted) finding by the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd*.¹⁰

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court’s judgment in *BP Oil NZ Ltd v Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. **Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the**

⁸ Ms Campuzano was made aware that termination of her employment was being considered via the letter of 3rd November 2009 and she responded via letter dated 12th November 2009.

⁹ Unreported, CEC 4/98, 30 January 1998.

¹⁰ [1992] 3 ERNZ 483,487.

employment relationship. In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one that a reasonable and fair employer would¹¹ have taken in the circumstances. (My emphasis)

Determination

[28] I find that because of the egregious views of her employer, held by Ms Campuzano, and evident by her allegations against Ms Fouché on 8th October 2009; and from which Ms Campuzano was not prepared to resile, there was an irreconcilable breakdown in trust and confidence between the parties. It follows that I also find that the dismissal of Ms Campuzano was the action of a fair and reasonable employer in all the circumstances.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed well within one day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

¹¹ Section 103A uses the word *would* and this is the test that has been applied to this matter given that it came about prior to 1 April 2011.