

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jane Carter (Applicant)
AND Southpark Corporation Ltd (Respondent)
REPRESENTATIVES Michael O'Brien, Counsel for Applicant
David Smith, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 26 September 2005
SUBMISSIONS RECEIVED 28 and 30 September 2005
DATE OF DETERMINATION 29 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jane Carter says she was unjustifiably dismissed by her former employer, Southpark Corporation Limited ("Southpark"). Southpark denies there was a dismissal and says Ms Carter left of her own accord.

Ms Carter's employment

[2] Ms Carter was employed as a personal assistant to Southpark's CEO, John Sax. She was recruited to the position through Kinetic Recruitment Consultants ("Kinetic"), and began her employment on 11 October 2004.

[3] Kinetic had provided Mr Sax with a resume for Ms Carter, which included reference to strong proficiency in several common office software packages. The resume also listed software training courses Ms Carter undertook between 1995 and 1999. Kinetic's covering report recorded that its testing showed Ms Carter was an advanced user of MS Word and Powerpoint, and an intermediate to advanced user of MS Excel.

[4] Mr Sax developed concerns about Ms Carter's performance almost immediately. When I asked him what they were he identified what he described as elementary errors such as failing to provide him with colour-printed documents when requested to do so, sending email messages without their attachments, and dissatisfaction both with failures by Ms Carter to follow instructions and repeated requests from her for instructions. Mr Sax also believed Ms Carter was struggling with the fact that a number of corporate entities are associated with the Southpark group, and with the different ways of dealing with those entities.

[5] As early as the second or third day of Ms Carter's employment Mr Sax contacted Sharn Jones, the consultant from Kinetic who had recruited Ms Carter, to express his concerns. He said in evidence he did so to put Kinetic on notice that he may hold it to the guarantee period in Southpark's contract with Kinetic. He told Ms Jones it was apparent to him that Ms Carter's skill levels were not as had been represented, and I understand the question of whether Ms Carter's abilities were misrepresented is now the subject of litigation between Southpark and Kinetic. Finally, the tone of the evidence overall leads me to consider it likely that, as Ms Jones said, Mr Sax told her he did not believe Ms Carter's personality was suited to the role.

[6] Ms Jones contacted Ms Carter to see how her employment was progressing, and Ms Carter said everything was fine. From Ms Carter's point of view at the time, that was the case. Mr Sax had not expressed his concerns to her.

[7] However Mr Sax continued to be dissatisfied, and over the course of the next fortnight solicited other employees' views of Ms Carter's competence. They provided him with examples of questions Ms Carter allegedly asked them, and which appeared to illustrate very basic errors or lack of understanding on Ms Carter's part concerning the use of common office software. Mr Sax spoke to the group financial controller, Robert Mitchell, among others. Mr Mitchell provided a note dated 26 October 2004 of his 'observations regarding Jane's IT competence', which included allegations about Ms Carter's knowledge of MS Word and Excel. He also told Mr Sax he did not think Ms Carter was suited to working with someone like Mr Sax - an entrepreneur who likes to work in an unstructured environment.

[8] On 20 October 2004 Mr Sax sought a meeting with Ms Carter to review her employment and because, as he put it, he was concerned that she understand how wide and varied his work was. He wanted to discuss with her whether she believed she was suited to a position like hers. When arranging the meeting he told Ms Carter he wanted to discuss how 'things were going'. In reality he wanted to test whether she would decide for herself to find another job, and to give her some gentle encouragement to think along those lines.

[9] Unfortunately by the start of the meeting Ms Jones had told Ms Carter that Mr Sax had complained about her, and indicated the nature of some of the complaints. Ms Jones should not have passed on that information. In the context of the employment relationship it was for Mr Sax to raise concerns with Ms Carter if he had them, and to take the consequences if he proceeded wrongly or unfairly. Ms Jones should have kept between Kinetic and Southpark any dispute that may have been brewing between them at the time.

[10] Because of what Ms Jones had told her, Ms Carter thought Mr Sax would raise his concerns in their meeting. She believed the two could sort out any problems at the meeting.

[11] However Mr Sax did not raise the concerns he had expressed to Ms Jones. Instead, in an ostensibly conversational and chatty context, he proceeded to explain to Ms Carter that he had an entrepreneur's mind while she was very organised. He put it to her that she might become frustrated if she continued to work for him. He accepted in evidence that he told Ms Carter she needed to consider her position. Ms Carter said in evidence she was getting the feeling Mr Sax wanted her to consider whether she should stay - which is indeed what he wanted her to do. There was a conflict in the evidence over whether her response was to ask:

- (a) Whether Mr Sax wanted her to leave the next Friday, and he said 'no', but that he wanted her to start looking for another job over the next two or three months (Ms Carter's account);
or

- (b) What sort of time she would have to look for another position if she decided the position with Southpark was not suitable for her (Mr Sax's account).

[12] Because of her understanding of what Mr Sax had said to her, Ms Carter was so upset after the meeting she sought sick leave for the rest of the week.

[13] She also contacted Ms Jones on or about 21 October, providing Ms Jones with a reasonably detailed summary of her understanding of the 20 October discussion. The summary included the following statement: "[Mr Sax] thinks that if I stayed I would get more and more frustrated with him and he is so certain that he won't contemplate even leaving it a couple of months he wants to give me two months in which to find another job. He thinks I would probably find one within one or two months."

[14] Ms Jones should have suggested to Ms Carter that she seek independent advice on the implications for the employment relationship of that kind of statement from Mr Sax. If Ms Carter's account was accurate, it described a dismissal. Instead Ms Jones suggested another meeting with Mr Sax. As Ms Jones put it in evidence, the meeting was to 'find out the wider picture'. Ms Carter left Mr Sax a note referring to her absence because of her feelings of stress, and saying: "I have arranged for Sharn and Kate to come into Southpark next Tuesday at 10.00 am to discuss the situation."

[15] The following week, on Tuesday 26 October 2004, Ms Jones and her manager Kate Ross, as well as Ms Carter, met with Messrs Sax and Mitchell. Mr Sax expected the meeting to be between Southpark and Kinetic, and was not expecting Ms Carter to be involved.

[16] Ms Carter understood that a purpose of the meeting was to address Mr Sax's complaints about her, as well as her understanding that Mr Sax had asked her to find another job. However those were matters arising directly out of the employment relationship. Kinetic should not have been involved in such a meeting.

[17] Despite all of this, although he was taken a little by surprise by Ms Carter's presence, Mr Sax allowed the meeting to begin with some discussion of his concerns about Ms Carter's competence. In turn Ms Carter read a prepared statement in which she expressed her positive view of her job and her feeling that she had done nothing to warrant being asked to find another job. Thus the meeting began without its proper purpose or the roles of the participants being clarified.

[18] Then, because his purpose was to discuss his concerns with Kinetic, Mr Sax asked Ms Carter to leave the room. After she had done so, he embarked on a considerably more detailed discussion of his concerns. He had prepared a document which he handed to Ms Jones and Ms Ross during that discussion. It focussed on his doubts about whether Ms Carter's CV accurately reflected her skills, particularly her computer skills, and whether adequate reference checks had been carried out. It ended with suggestions about various payments Kinetic could make by way of remedy. Mr Sax also presented the information he had solicited from other employees, addressing Ms Carter's competence in the use of office software.

[19] At the end of that discussion Messrs Sax and Mitchell left the room, and Ms Carter returned. She saw the notes setting out the other employees' comments. Hardly surprisingly, she became even more upset. She could not return to work that day, so left a note for Mr Sax to that effect.

[20] The next day Ms Carter again felt unable to attend work. During the morning Mr Sax telephoned her saying he wanted to commence a performance review. Ms Carter believed Mr Sax had made it clear he wanted her gone, and she was hurt even more by his going behind her back to obtain complaints from staff members about her performance. She felt she was about to be 'performance reviewed' out of her job, and she could not return to work.

[21] Accordingly by letter to Mr Sax dated 28 October 2004, Ms Carter's solicitors formally raised Ms Carter's personal grievance on the ground of unjustified dismissal. The dismissal was said to have arisen from Mr Sax's 'lying' about Ms Carter's ability to perform basic tasks, questioning colleagues about her performance, and telling her to look for another job.

[22] By letter dated 2 November 2004 Southpark's advocate advised Ms Carter had not been dismissed, and that the letter raising a grievance was being taken as a resignation without notice.

Determination

[23] Ms Carter has not relied on an allegation that she was actually dismissed during the 20 October meeting. Rather the allegation is that the cumulative effect of the conduct just set out amounted to a constructive dismissal. Particular reliance has been placed on allegations of breach of clause 19.1 of the parties' employment agreement. The clause read in part:

"The employer undertakes to act as a good employer in respect of the employee, providing fair and proper treatment in all aspects of employment."

[24] Thus it was said Mr Sax breached the obligation to act as a good employer in: misleading Ms Carter about his true view of her performance; not giving her an opportunity to answer his concerns while approaching other staff members to draw up lists of complaints; and telling Kinetic she was not suitable. The allegation that he had lied to Kinetic about Ms Carter's skills was, appropriately, not pursued.

[25] Mr Sax said at the investigation meeting that he had two essential concerns about Ms Carter – her level of computer skills and the fit of her personal style. The only concern he put to her was the latter, and no more than indirectly even then. However the way he went about addressing the former was particularly unfair to her. He explained that the reason for his approach was his wish to focus with Kinetic on whether it had properly represented Ms Carter's skills to him, but in doing so he went behind Ms Carter's back to solicit quite damaging criticisms to which she had no opportunity to respond. In making a point of seeking that information, outside the context of any attempt at performance management and without any intention at the time of putting the concerns to her, he could only undermine her. To say Kinetic made her aware of the information when it should not have, although true, is not an adequate answer.

[26] I do not agree with the submission that Mr Sax acted appropriately in attempting to verify his concerns about Ms Carter's skills, and taking the matter up with Kinetic before doing so with Ms Carter. That is because Mr Sax sought to 'verify' Ms Carter's skills by questioning other employees about her, in the process obtaining damaging responses and presenting them to Kinetic as if they were true and accurate. I doubt very much that it was appropriate to 'verify' Ms Carter's skills by effectively soliciting complaints from other employees. Even if it was appropriate to question other employees about their experiences with Ms Carter, it was not fair to Ms Carter to attempt to use the results without finding out something of whether Ms Carter agreed the incidents referred to occurred, or whether she could explain them. That does not mean a full performance management process was required before any approach was made to Kinetic, only that Mr Sax should have taken reasonable steps to check on the accuracy of the information he was attempting to use.

[27] As for the parties' personal styles, Mr Sax had formed a view that they were not a good fit. I do not believe he had any real wish to continue the employment relationship, and consider Ms Carter had good reason to be concerned that she would be 'performance reviewed' out of her job. Although the representatives from Kinetic did not observe the distinctions they should have regarding their involvement, the real effect was probably that they hastened the likely end of Ms Carter's employment.

[28] Overall, and even if her construction of the 20 October conversation itself was wrong, I find Ms Carter was justified in concluding Mr Sax wished her to leave.

[29] Counsel for Southpark suggested that a decision of the Employment Court in **Review Publishing Company Limited v Walker** [1996] 2 ERNZ 407 might be of assistance. There are certain similarities in that there, as here, an employer sought to raise an issue about an employee directly with the relevant recruitment agency in the first instance, rather than with the employee. However there the employee left the workplace because she became ill on hearing other employees' tales about the conversations between the agency and her employer, rather than because she considered her employment at an end. Not only that, she left with permission. Her employment ended in the course of a later conversation about her remuneration.

[30] Here Ms Carter left and did not return to work because she felt the employment relationship had broken down. She had reasonable grounds for that conclusion. Moreover Mr Sax' actions in soliciting and using adverse comments about Ms Carter in the way he did, particularly without making any attempt to check on their accuracy or on whether there was an explanation, was unfair treatment and not the act of a good employer. He failed to adhere to the undertaking set out in clause 19.1 of the employment agreement and the circumstances of the failure were instrumental in Ms Carter's reaching the conclusion that her employment was at an end.

[31] For these reasons I find there was a breakdown in trust and confidence between the parties in circumstances amounting to a dismissal. The dismissal was not justified and Ms Carter has a personal grievance.

Remedies

[32] Ms Carter's evidence was that she lost income in the sum of \$11,112.08 between the date of her dismissal and 1 May 2005, when she commenced in a long term position. Until then she had earned income as a temporary employee, which was taken into account in the calculation of her loss.

[33] Ms Carter's salary at Southpark was \$55,000 per annum. I accept that she mitigated her loss, but not that the loss was caused entirely by her grievance. Some was caused by her decision to accept temping work. With reference to s 128 of the Employment Relations Act 2000 I therefore order Southpark to pay Ms Carter the equivalent of three months' salary, less the amount she earned in the first three months after her dismissal.

[34] Ms Carter is entitled to compensation for injury to her feelings. She gave evidence of such injury, and I accept that the termination of her employment was a serious blow to her. I assess compensation at \$7,500.

Summary of orders

[35] Southpark is to pay to Ms Carter:

- (a) three months' salary less income earned during the three months after her employment with Southpark ended; and
- (b) \$7,500 as compensation for injury to her feelings.

Costs

[36] Costs are reserved.

[37] The parties are invited to reach agreement on the matter. If they seek a determination of it from the Authority they should file and serve memoranda on the matter within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority