

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Terry Castle (Applicant)  
**AND** New Zealand Fire Service (Respondent)  
**REPRESENTATIVES** Simon Mitchell for applicant  
Stephen Richard Fraser, for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 20 September 2005  
**SUBMISSIONS RECEIVED** 3 October 2005  
**DATE OF DETERMINATION** 13 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Castle is a fire safety officer with almost forty years experience in his field. This problem is about whether his employer disadvantaged him by unjustifiably curtailing his authority in his work.
- [2] Mr Castle lodged his personal grievance with the Authority on 8 August 2006. He said it related to “*a direction ... not to communicate with external stakeholders without prior consultation with the Chief Fire Safety Officer.*” Mr Castle considered any direction to this effect would be unreasonable and unlawful because communication with external stakeholders was “*part and parcel of his duties.*” His view was that it would not be possible to perform his role if he was constrained in this way.
- [3] The contentious direction was issued to him in a letter dated 5 July and stayed in place until rescinded on 8 August. Upon receipt of the letter he was distressed to the point that he felt unable to work at all and went on sick leave until 15 August. The issues for determination are whether the alleged direction amounted to an unjustified action towards Mr Castle and if so whether he suffered any disadvantage as a result.
- (i) Was there an unjustified action?
- [4] A direction relating to external communications was first given to Mr Castle by his immediate manager, Chief Fire Safety Officer Binning, at a meeting on 2 June 2005. Mr Binning was concerned that Mr Castle had sent a client a report criticising a private sector fire engineer.

- [5] Mr Binning told me that he made it clear to Mr Castle that “*he was not to send out any reports or other similar communications to outside agencies that were in the least bit controversial, challenging or critical of a third party*” without having them cleared first.
- [6] Mr Castle confirmed to me that he had understood at that stage that anything which contained a criticism of someone external to the Fire Service should be cleared by management before going out. If I have understood him correctly he raises no objection to the 2 June instruction and for the record I note that I also consider that instruction reasonable.
- [7] On Thursday 30 June 2005 Mr Binning received a formal complaint from a NZFS staff member about conduct by Mr Castle. The allegation was that Mr Castle had forwarded an internal email from the other staff member to a client, causing the staff member considerable embarrassment because the email divulged the name of a contractor who had communicated privately with NZFS over fire safety concerns involving the client. There was also a concern that in his own covering email, Mr Castle made comments that appeared critical of NZFS.
- [8] In a letter dated 5 July 2005 Mr Binning wrote to Mr Castle commencing disciplinary proceedings by requesting his attendance at a meeting to discuss these allegations. The letter indicated that the alleged conduct could amount to a breach of both the 2 June instruction and the NZFS Standards of Conduct. The June 2 instruction was restated in the following terms;
- “I advised you that you were not to send out any further advisories to external stakeholders without prior consultation with myself.”*
- [9] Mr Castle was concerned that the original instruction was now being held out as something other than it had actually been. He considered that as restated it went much further than what he was told on 2 June. He construed it as meaning that he should get clearance for *everything* he proposed to send out to clients and others external to the organisation.
- [10] Two main issues arose out of this. First, he felt he was being disciplined for failing to follow an instruction he had not received. Second, he felt the scope of the direction as now stated, made it impossible to do his job. He was also concerned that there was no longer any indication that other managers could clear material in Mr Binning’s stead.
- [11] He considered the 5 July restatement of the instruction to be unlawful and unreasonable and a breach of his employment agreement. So distressed was he that he required medical assistance and was put on sick leave by his doctor. He remained on leave until 15 August.
- [12] On 12 July Mr Mitchell raised a disadvantage grievance on Mr Castle’s behalf. His letter read in part:
- “Mr Castle has a personal grievance against the New Zealand Fire Service for unjustified action, as a result of unreasonable interference in the performance of his duties. Mr Castle considers it difficult enough when he was required to have his reports approved by you. As it is now asserted that all external communication needs to be approved, it is not possible for Mr Castle to perform his duties properly.*
- [13] Mediation followed. Afterwards, Mr Castle felt that the issues had not been resolved to his satisfaction and decided to lodge his problem with the Authority. Mr Mitchell did so on

8 August. Urgency was sought and the Authority asked to determine the legality of the direction, resolve the disciplinary issues and provide clarity to the Applicant in his day to day duties.

- [14] Unbeknown to Mr Castle until later, on 8 August, Assistant Fire Region Commander Cliff Mears had also written to him saying:

*“matters are becoming bogged down in the question of what, if any instruction Mr Murray Binning gave to you regarding future communications with external agencies...I consider that even in the absence of any prior instruction that may have been given to you, [your] behaviour breaches a number of the NZFS Standards of Conduct...”*

*Given my wish to focus on the email...I hereby formally rescind Mr Binning’s instruction*

*In the absence of any acceptance of error by you in sending the 30 June e-mail, I intend to issue you with a first written warning. It would be on the grounds of breaches of the above Standards of Conduct. For the avoidance of doubt the warning would not be based upon any refusal to obey a lawful instruction.”*

- [15] After becoming aware of this letter Mr Mitchell withdrew his request for urgency however he noted that there remained issues between the parties relating to the disciplinary process and to the need for clarification of Mr Castle’s duties. I directed the parties to mediation. At this stage, the respondent’s human resources specialists became involved and the focus shifted to the “big picture.” The disciplinary issues were resolved and a memorandum of understanding was developed that defined Mr Castle’s duties to the satisfaction of both parties.

- [16] This did not however dispose of all Mr Castle’s concerns. He remained aggrieved about what he had experienced in the interval before the instruction was rescinded and wanted redress for the stress and uncertainty he suffered then. He requested an investigation meeting to determine the question whether the letter did indeed amount to an unjustified action to his disadvantage, and later, through Mr Mitchell, claimed a sum of \$5,000.00 compensation for the hurt and humiliation he said he experienced as a result.

#### Determination

- [17] As we have seen Mr Castle considers that the instruction set out in the letter of 5 July was unreasonable and unlawful because it made it impossible for him to do his job. In addition he says it was wrongly held out as having been given to him on 2 June. He said the 2 June instruction was different (narrower in scope.) This caused further concern as he felt he was facing disciplinary proceedings for a retrospective breach of an instruction on new terms.

- [18] The respondent has not sought to justify an instruction of the expanded scope set out in the letter, and eventually rescinded it in its entirety. Mr Castle says the rescinding of the instruction does not adequately address the distress and sense of grievance he sustained while subject to it (in the period from 5 July to 8 August.) Whether it was worded as it was by accident or by design, the giving of the restated instruction was in his view wrong, and he says the employer must take responsibility for the serious consequences it had for him.

- [19] I have reached the following conclusions as to the facts of this matter:

- (i) In the letter of 5 July Mr Binning intended to record the instruction he had given Mr Castle on 2 June. Unfortunately, he did not succeed in rendering it accurately;
- (ii) This failure of clear expression was not intentional;
- (iii) It was reasonable for Mr Castle to construe the 5 July instruction as being wider in scope than the original instruction;
- (iv) The respondent was justified in commencing disciplinary proceedings in relation to an alleged breach of the Standards of Conduct and to an alleged breach of the 2 June instruction;
- (v) It was not however justified in commencing disciplinary proceedings in relation to an alleged breach of the direction as expressed on 5 July. As expressed the instruction created an additional disciplinary risk for Mr Castle;
- (vi) The scope of the instruction as expressed would have made it very difficult for Mr Castle to do his job, since daily contact with individuals and organisations outside the fire service was indeed “part and parcel” of his job;
- (vii) The respondent has not justified an instruction of that wider scope.

**[20] The instruction as expressed on 5 July was, in short, a mistake. It was therefore an unjustified action on the part of the employer towards Mr Castle.**

(ii) Was Mr Castle disadvantaged?

[21] By the time Mr Castle returned to work the 5 July instruction had been rescinded. Meanwhile the fact of his leave and the reasons for it had been kept confidential. The actual performance of his work, then and later, was unaffected. However between 5 July and 8 August he believed that if he had returned to work limits would have been placed on his autonomy, something he had not experienced before. Just knowing this was distressing for him. He felt he would not be able to do his job or at least, not properly, and so would be letting clients down.

[22] As we have seen the prospect of a disciplinary process was also made more fraught for him by the inference that he had, since 2 June, been subject to an instruction of the scope expressed on 5 July when in fact he had not.

[23] From the time the grievance was raised on 12 July Mr Mears, Mr Fraser and others made constructive attempts to address Mr Castle’s concerns, whilst (quite properly) holding him to account for a formal complaint. Although it did take almost a month for the instruction to be rescinded, this was in part because of Mr Castle’s ill-health. I do not, in these circumstances, consider that the respondent was tardy in addressing and resolving Mr Castle’s concerns.

[24] I also note that Mr Binning was not alone in failing at times to make his meaning clear. Mr Castle was prone to prevarication and obfuscation. He did not immediately concede that he had been given an instruction on 2 June and when he did, he did not give a clear account

of what he thought was the difference between that instruction and the one on 5 July. For example, he suggested at one point that the key feature of the original instruction was that only certain types of *technical* report needed to be run past his manager. This attitude did not help in getting matters addressed, or addressed promptly, and hampered the respondent's constructive efforts to address the employment relationship problems.

[25] I conclude that Mr Castle did have a grievance but once it was lodged the respondent remedied it in a timely fashion by rescinding the instruction. Mr Castle suffered some distress in the interval but he contributed in a major way to that disadvantage.

**[26] In such circumstances I do not consider an award of compensation to be warranted. The respondent has already addressed Mr Castle's concerns to my satisfaction. In order for this employment relationship to proceed productively Mr Castle as well as the respondent's managers will now need to work in a constructive and positive manner.**

### Costs

[27] From what I have seen so far this may be an appropriate case for costs to lie where they fall. However I have yet to hear the parties on this subject and so reserve the issue at this stage. The parties have a period of 28 days in which to make any claim for costs.

Y S Oldfield  
Member of Employment Relations Authority