

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 112/10
5161774

BETWEEN WILLIAM STUART CLARK
 Applicant

A N D IDEA SERVICES LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Mr Clark in person
 Paul McBride, Counsel for Respondent

Investigation Meeting: 6 and 7 October 2009 at Invercargill

Submissions Received: On the day

Determination: 7 May 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Clark claims he was unjustifiably suspended and later unjustifiably dismissed from his position of Area Manager Southland/Gore with the respondent. The applicant seeks remedies of reinstatement, reimbursement of remuneration lost as a result of his grievance, compensation for hurt and humiliation and costs.

[2] The respondent denies it unjustifiably suspended or unjustifiably dismissed Mr Clark. It says it completed a thorough investigation into the matters of complaint raised against the applicant and accordingly, it declines to offer the remedies the applicant wants.

[3] The parties attended mediation but were unable to resolve their differences.

Brief history

[4] Mr Clark was employed by IDEA Services as Area Manager on 10 March 2008. He reported to the respondent's General Manager Central/Southern, Ms Tracey Ramsay, who was based in Christchurch and who in turn reports to the respondent's Chief Executive.

[5] In July 2008 matters of concern to the respondent were brought to its notice regarding Mr Clark's handling of his role. They were his making critical and derogatory statements about senior managers, failure to follow organisational procedures, in particular the national recruiting process, and of engendering a *them and us* environmental culture between staff reporting to him and those with whom he interacted.

[6] The respondent flew Mr Clark to Christchurch to meet with his immediate Manager. As a result of that meeting Mr Clark accepted that his statements and actions were inconsistent with his role and therefore unacceptable. The applicant assured Ms Ramsay he would in future work within the boundaries set by the respondent's policies and procedures and assured her these types of issues would not be repeated.

[7] However, in March 2009 a series of other complaints came to light and Mr Clark was required to attend an investigation meeting regarding these complaints. Three distinct issues were identified:

- not following the policies and procedures regarding a change in a service user's living arrangements;
- concerns raised by three families who regarded their relationship with Mr Clark as unsatisfactory; and
- incidents of the applicant making derogatory comments to staff and others about senior management personnel.

[8] The respondent formally advised Mr Clark of these issues, providing detailed information to him. It wanted to engage with him in its investigation. As Mr Clark was busy with audits at the time, he requested the investigation be postponed until he had time to address each of the issues raised. Reluctantly, the respondent agreed.

However, during that delay in meeting Mr Clark further issues arose. These involved the suggestion Mr Clark was attempting to muster support from the local management team over the issues IDEA wished to investigate; an allegation he had behaved unprofessionally in front of other staff; allegedly disclosing to staff information which was confidential to the applicant and his manager; and issues over Mr Clark's relationship with WellNZ, the respondent's ACC manager.

[9] The respondent wanted responses to these recent matters as well as the original issues and asked Mr Clark to attend a meeting on 3 April 2009. It also advised the applicant the meeting was potentially a disciplinary meeting. Ms Ramsay *invited and encouraged* Mr Clark to bring a representative/support person to the meeting and further, advised Mr Ross Maden, the respondent's Employment Relations Manager, would also attend the meeting.

[10] Before the meeting day, but after the 30 March letter advising of the meeting, a further matter regarding Mr Clark's apparent attempt to have staff support him over the complaints already notified to him arose. The respondent confirmed this issue was notified to the applicant before the 3 April meeting and the possibility of suspension pending its completion of the investigation was also raised.

[11] The issue of suspension was discussed at the meeting and the respondent sought comment from Mr Clark and his solicitor regarding *more palatable* alternatives to suspension. However, the solicitor suggested suspension on pay was the appropriate course to follow in this matter.

[12] In a meeting between the parties on 21 April 2009 the applicant's solicitor confirmed that all the material requested from IDEA had now been received and Mr Clark's responses to the complaints were received by the respondent. Each complaint was dealt with in turn and the meeting notes confirm a very thorough and open discussion between all parties. At the end of the meeting it was agreed the suspension would continue until a meeting to be held on 28 April.

[13] On 27 April Ms Ramsay wrote to Mr Clark via his solicitor's offices. In that letter the respondent set out its findings in the light of the applicant's responses to its concerns. Ms Ramsay sets out her findings on 7 issues and wrote:

When those matters are considered individually and cumulatively, I have concluded that the relationship of trust and confidence that I

need to have in you as a very senior Manger operating remotely from me, has been destroyed by your actions. Put differently, neither I nor IDEA Services can, on the basis of your recent actions, have any confidence that you will perform the requirements of your role in a proper fashion in future.

Outcome

Given my findings above, dismissal (which might include summary dismissal) is one of the outcomes that remains open. It is an outcome that I am seriously considering.

Before I make a final decision on the outcome, I do need to consider whether any other sanction could be appropriate. For this to occur, it seems to me that I would need to be convinced by you that your recent past actions were an aberration, and that your future actions will be quite different. At this point I have real questions about that.

Before I make a final decision on outcome, I seek to have your input on this issue alone. I would like you to provide me with any further information that you wish to provide, and which might influence my decision by showing that restoration of the employment relationship is not only realistic at (sic) attainable, but is likely to be workable going forward. Once you have had an opportunity to do that, then I will make and communicate my final decision.

I have arranged to meet with you at 10.30am on Tuesday 28 April at the Community House, 46 Kelvin Street, Invercargill.

I look forward to discussing the matters with you then.

[14] Ms Ramsay met with the applicant and his solicitor as arranged on 28 April and the Minutes of the 21 April meeting were discussed. Following this discussion Mr Clark said he had no further comments to make. Following an adjournment to consider the matter again, the meeting reconvened and the decision to summarily dismiss Mr Clark was communicated to him.

[15] In a letter of 1 May 2009 Ms Ramsay said:

The reasons for this (summary dismissal) were the findings documented in my 27April letter, together with my conclusion after we met on 28April that, in all the circumstances, I could not see any way of restoring the required high level of trust and confidence in you as a senior Manager, or other realistic alternatives. Part of that consideration was your role working largely independently and remotely from me. Another was your actions that had given rise to the issue in the first place. I also note that you presented nothing further for me to base any view that restoration of an (sic) relationship was possible, let alone likely.

Thank you for making appropriate arrangements for the return of the motor vehicle and office keys.

The issues

[16] To resolve this matter the Authority needs to make findings on the following issues:

- Was the suspension unjustified or not; and
- Was the summary dismissal unjustified; and
- If either or both were unjustified, to what remedies is the applicant entitled; and
- To what extent, if any, did the applicant's behaviour contribute to the circumstances giving rise to the grievances?

The test

[17] The test for justification is set out in s.103A of the Employment Relations Act 2000 and requires the Court or Authority to determine, on an objective basis, by considering 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 or action occurred.

The investigation meeting

[18] At the investigation meeting the Authority heard evidence from Mr Clark, his partner, Ms Karen Carter, Ms Barbara Anderson, Union Organiser, Mr Darren Lock, the former Community Services Manager (CSM), and under summons, Ms Barbara Kelly, Mr Steven Kirby, Ms Jenny Leonard and Ms Kirstie de Garnham, all CSMs with the respondent at the time. For the respondent, evidence was provided by Ms Tracey Ramsay and Mr Ross Maden.

[19] The Authority wishes to record its appreciation for the way in which evidence was given and for the frank manner in which questions put before them were answered. The Authority also wishes to acknowledge the efforts of Mr Clark and Mr McBride in providing their submissions for consideration. Those have been re-read in association with notes taken at the time of their delivery and have been taken into account in my coming to this determination.

Analysis and discussion

[20] Mr Clark is a man who is passionate about the work undertaken by organisations providing care to the disabled and who has a *can do* attitude in his approach to his work with these clients and their families.

[21] His major complaint focuses on the respondent's process adopted when investigating the complaints referred to in part above. Mr Clark says the respondent's decision to suspend him while complaints were investigated was not justified and its conclusion that it could no longer have trust and confidence in him as an Area Manager was also unjustified. The applicant clearly formed, and retains, a view that even in spite of the difficulties between the parties, he is capable of restoring IDEA's confidence in him as an Area Manger.

Suspension

[22] Counsel for the respondent refers to the IDEA documentation which specifically provides for suspension of employees. Clause 6.3.1 of the Standard Conditions of Employment states:

An employee may be suspended on pay where serious misconduct is alleged by the employer. During the suspension a determination shall be made by the employer whether the employee is to be dismissed or the suspension lifted.

[23] The IHC Staff Policy also states:

The employee may be suspended on pay while an investigation is taking place.

[24] Counsel also referred the Authority to several precedent cases including *Sefo v. Sealord* [2008] ERNZ 178, Colgan CJ, in which it was said that natural justice and good faith obligations generally require an employer considering suspension to advise the employee of that possibility, the grounds for doing so, and provide the employee an opportunity to dissuade the employer from that course of action.

[25] The issue of suspension was first raised by Ms Ramsay in her email to the applicant on 2 April 2009 in which she advised him it was possible she may consider suspension on pay at the meeting scheduled for the following day. The matter was discussed at the meeting, with Mr Clark's solicitor present and actively participating

in discussions. The uncontested evidence before the Authority is that the solicitor accepted the suspension on pay was appropriate in the circumstances.

[26] There can be no doubt the suspension was both lawful and justified.

Dismissal

[27] In the course of its investigation of this matter the Authority has heard evidence and reviewed documents relating to a considerable range of complaints regarding the applicant's performance in his role. Some were from families of service users, others from a clinical leader, the organisation's ACC manager, the Ministry of Health and a service user who considered she had been sexually abused in one of IDEA's houses.

[28] Much of this evidence is sensitive and while I have re-read much of it, I have not found it necessary to refer to it in detail in this determination. Much of it relates to privacy and confidentiality issues and for that reason a permanent order is now made suppressing the names and details of all service users, all family names and details and details of IDEA's staff involved in matters giving rise to the Authority's investigation.

[29] An integral question is whether the respondent, following its investigation of the complaints, was entitled to decide Mr Clark's actions amounted to serious misconduct and presented an irretrievable loss of trust and confidence in the applicant. The thoroughness of the respondent's investigation is commendable, in particular its providing Mr Clark with details of each complaint, giving him and his counsel the opportunity to respond, taking time to consider those responses before coming to a preliminary view, putting that view and the reasons for it to the applicant and providing him with the opportunity to argue a penalty short of dismissal was appropriate in the circumstances of his case. When the respondent received no alternatives from Mr Clark, it only then confirmed its preliminary view and issued notice of dismissal. Ms Ramsay's 13 page letter of 17 April 2009 exemplifies the care she and the respondent took to ensure Mr Clark was fully informed of the complaints, and the interviews with complainants.

[30] Mr Clark challenges the process and told the Authority he acknowledged he had made errors but said that he had learned from them and they would not be repeated. Regrettably, Mr Clark had given similar undertakings the previous year, yet

further complaints had been made, several with very serious consequences for IDEA's relationships with key agencies as well as service users and their families. I have no doubt Mr Clark's undertaking was genuine yet, it is somewhat tarnished by his attempts to rally support for his cause from local staff and service users, going so far as to indicate to the respondent he would summons a service user to support him in his case. The inappropriateness of this proposal appeared to have eluded him.

[31] The evidence from his own witnesses did, on certain points, not assist Mr Clark's case. In reply to questions from the Authority and counsel, witnesses confirmed the applicant referring to Ms Ramsay as *she who must be obeyed, my mistress, and like the witch*.

[32] On the issue of reinstatement, several of the applicant's witnesses told the Authority, *I wonder how relationships can be repaired and I don't believe the damage done between our branch and regional can be mended by Nobby (Mr Clark)*. To be fair, several witnesses spoke well of Mr Clark's efforts in other areas of his job. Ms Kelly observed Mr Clark *has a lot of good skills and was supportive of me. At times when policy was in the way, he always found a way around it*.

[33] This latter issue goes to the heart of the respondent's concerns. Mr Clark said there were some policies he was not aware of, and in particular that directing what action was to be taken should an allegation of sexual abuse arise between two service users. That is, frankly, astonishing when all policies and procedures are readily available to staff on the IDEA intranet.

[34] The respondent, through Mr Maden, says the reasons giving rise to IDEA's loss of trust and confidence in the applicant were his not following policies and procedures causing breaches of contractual obligations; interactions with families and others which compromised IDEA's reputation, standing and contractual obligations; making derogatory comments about senior management; not following specific instructions from senior management, and lack of insight into the issues and their seriousness.

[35] Mr McBride in his submission said the nature and the combination of the issues in question was clearly such that a fair and reasonable employer in the circumstances would have concluded had deeply impaired and was destructive of the basic trust and confidence essential to an employment relationship. See *Northern*

Distribution Workers Union v. BP Oil NZ Ltd [1992] 3 ERNZ 483, 487 (CA). Again citing the Court of Appeal in *Airline Stewards and Hostesses of NZIUOW v. Air NZ Ltd* [1990] 3 NZILR 584, counsel noted the Court of Appeal observed that

Good working relationships depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable.

[36] The respondent also took into account when coming to its decision the geographical independence of Mr Clark's role. It says IDEA needs to have a high level of trust and confidence in all its Area Managers and says that consideration weighed heavily in the balance in coming to its decision to dismiss.

[37] It is clear from the evidence there was a serious obligation on Mr Clark to become familiar with, and strictly observe at all times, the standard policies and procedures. His failure to observe these and in particular his attempts at times to circumvent them, also weighed against him in the respondent's decision making process.

Determination

[38] Returning to the issues set out above in this determination, I find:

- The suspension was not unjustified as it was discussed and agreed to at the time.
- The summary dismissal was justified as I find a fair and reasonable employer, having undertaken a most thorough investigation and considered the seriousness of the issues concerned in the case would have dismissed the applicant.

[39] Mr Clark has been unsuccessful in his claims and the Authority is no longer able to assist him.

One final matter

[40] Following the morning adjournment on the first day of the investigation meeting, Mr McBride complained strongly that Ms Carter has launched a verbal attack on Ms Leonard in the course of the adjournment causing that witness considerable distress. The attack, I was advised, related to Ms Leonard's expressing

doubt as to how reinstatement of Mr Clark would assist in rebuilding broken relationships. Mr McBride submitted the incident constituted contempt under s.196(1)(a).

[41] The question put by the Authority to Ms Carter was whether the incident had occurred. She replied that it had, but that *Jenny is a friend of ours*.

[42] I spoke firmly to Ms Carter putting her on notice the matter was serious and the Authority would return to it later.

[43] Having considered this issue and in particular that fact that Ms Leonard had already given her evidence and further, that Ms Carter took the Authority's stern admonishing seriously and did not repeat the behaviour in the course of the investigation, I have decided to issue an order requiring her to formally apologise in writing to Ms Leonard within seven days of the issue of this determination. Ms Carter is to provide counsel for the respondent and the Authority with a copy of that signed letter, which will lie on the Authority's file.

[44] But for the fact that Ms Leonard had already given her evidence, the Authority is likely to have issued an order of more significant import.

Costs

[45] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority