

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 464/10
5291930**

BETWEEN SHERRIE DUNNINGS
 Applicant

AND SERIOUS FUN “N” MIND
 TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, Advocate for Applicant
 Jessica Humphrey, Counsel for Respondent

Investigation Meeting: 20 September 2010 at Whakatane

Submissions received: 24 September 2010 from Applicant
 1 October 2010 from Respondent

Determination: 29 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Sherrie Dunnings, claims that she has a personal grievance under s103A of the Employment Relations Act 2000 (“the Act”), in that she was unjustifiably dismissed on 20 November 2009. Ms Dunnings claims that the dismissal was unjustifiable both substantively and procedurally.

[2] The respondent, Serious Fun ‘N’ Mind Trust (“the Trust”), claims it acted fairly and reasonably in dismissing Ms Dunnings.

[3] Ms Dunnings claims that the written warning issued to her on 2 September 2009 was unjustifiable and disadvantaged her in her employment.

[4] The Trust claims that the written warning was justifiable.

Issues

[5] The issues for determination are:

- i. Was Ms Dunnings unjustifiably disadvantaged in her employment with the Trust?
- ii. Was Ms Dunnings unjustifiably dismissed from her employment with the Trust?

Background Facts

[6] The Trust was incorporated in 1999 with the intention of promoting equity, respect and inclusion for people with an experience of mental illness living in the Bay of Plenty and Lakes districts. The Trust holds presentations, runs workshops and generally seeks to provide mental health support in the Bay of Plenty area.

[7] Ms Dunnings commenced employment with the Trust on August 2006 in the position of Office Administrator, reporting to Mr Grant Kelly, Executive Officer. In March 2008 Ms Dunnings was promoted to the position of Administration Manager. This promotion did not result in a change to her written employment agreement but her hourly pay rate was increased, her weekly hours were confirmed as 25 hours per week, and regular attendance at, and minute keeping of, the Trust meetings was expected.

[8] Mr Kelly resigned from the Trust in June 2009 and Mrs Veronique Stewart-Ward, an existing Trustee at that time, was appointed by the Trust as Acting Interim Manager. A permanent appointment was not made on the basis that one of the Trust's contracts had not been renewed and a redundancy process was in progress.

[9] The evidence of Mrs Stewart-Ward and Mrs Gwenda Paul, Chairperson of the Trust, was that there were concerns about various discrepancies in the management of the Trust. As a result Mrs Stewart-Ward began to introduce a number of administrative changes.

[10] Ms Dunnings gave evidence that these changes were introduced without consultation with her, and that in early June 2009, she was instructed without notice or discussion to stop attending Trust meetings, and was told on 21 July 2009 that she was no longer required to attend meetings of the Trust board or to record the minutes of the meetings.

[11] In her role as Administration Manager, Ms Dunnings was responsible for interactions with Action Accounting, an accountancy firm providing accountancy services to the Trust. During May and June 2009 there had been some discussion about the level of fees being charged to the Trust by Action Accounting. Ms Dunnings had requested a reduction in the level of fees being charged on the basis that there had been a reduction in the number of contracts for the Trust, resulting in a lower level of business. Action Accounting held the view that the fees being charged required an increase.

[12] Ms Chapman, an Accountant with Action Accounting, had written to the Trust on 2 July 2009 advising that Action Accounting would be withdrawing their services with immediate effect as a result of issues which had arisen in their relationship with Ms Dunnings.

[13] Mrs Stewart-Ward did not discuss this letter with Ms Dunnings, and did not give her an opportunity to provide her view of the situation. Instead Mrs Stewart-Ward met with Ms Chapman on 6 July and agreed, without consulting Ms Dunnings, that all correspondence and communications with Action Accounting would henceforth be handled by her and not by Ms Dunnings.

[14] On 28 July 2009 Ms Dunnings commenced two weeks annual leave. During Ms Dunnings absence, Mrs Stewart-Ward said that she had issued a newsletter dated 31 July 2009 to all Trust staff, outlining changes to the Trust's procedures, which was followed up by a memorandum dated 3 September 2009.

Written warning

[15] On 27 August 2009 there was a meeting between Mrs Stewart-Ward and Ms Dunnings to discuss this memorandum and the changes contained therein. Mrs

Stewart-Ward said that she had given Ms Dunnings a verbal warning at this meeting on the basis of Ms Dunnings alleged inability to follow instructions.

[16] Ms Dunnings said that she had not been given prior notice of this meeting, was not advised that the meeting would be of a disciplinary nature, or that she had the right to representation at the meeting.

[17] Ms Dunnings said she felt distressed and unwell following the meeting and Mrs Stewart-Ward encouraged her to go home on sick leave. Mrs Stewart-Ward said that she reported the discussion which took place at the meeting to the Trust Board. Mrs Stewart-Ward said that as a result she was instructed by the Trust Board to issue Ms Dunnings with a written warning should Ms Dunnings not follow future instructions concerning the new procedures.

[18] Ms Dunnings returned to work in the afternoon of 3 September 2009, having attended an IRD training course in Rotorua in the morning. Upon arriving in the office, Mrs Stewart-Ward handed Ms Dunnings a letter addressed to her (Ms Dunnings). The letter was signed by Mrs Stewart-Ward and detailed some of the changes approved by the Trust Board and which were to be implemented immediately. Towards the end of the letter there was a paragraph which stated:

“I now refer to my memorandum dated 27 August 2009 and to clause 12.2 (iv) of your employment contract, i.e., “serious repeated failure to follow a reasonable instruction”, and I hereby give you a written warning in relation to said breach.”

[19] Ms Dunnings said that she had tried to discuss the letter and the warning on that day with Mrs Stewart-Ward, but that Mrs Stewart-Ward had left the office. Ms Dunnings did email Mrs Stewart-Ward and request a copy of the memorandum dated 27 August 2009 which she had not seen.

[20] By Friday 4 September 2009 Ms Dunnings said that she was feeling quite unwell and went to see her General Practitioner, who issued her with a medical certificate stating that she was unfit for work.

[21] On Monday 7 September 2009 Ms Dunnings wrote to Mrs Stewart-Ward to inform her of her sickness absence and enclosed the medical certificate. Ms Dunnings also requested that all communications be sent to her via post.

[22] During the period of sickness absence Ms Dunnings provided additional medical certificates as required, apart from one occasion when the previous medical certificate had expired on Monday 12 October 2009 and Ms Dunnings was unable to send the replacement certificate until Thursday 15 October 2009 as a result of a temporary inability on her part to fax the certificate to the Trust.

[23] Mrs Stewart-Ward wrote to Ms Dunnings by letter dated 15 October 2009. The letter made specific reference to clause 12.5 of the employment agreement between Ms Dunnings and the Trust. Clause 12.5 states:

“In the event the Employee has been absent from work for three consecutive days without a notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for termination of employment.”

[24] Ms Dunnings said that the letter with the reference to abandonment of employment had distressed her as she had kept the Trust informed of her absences throughout, and the outstanding certificate had been supplied to the Trust by 15 October 2009.

[25] Ms Dunnings wrote to Mrs Stewart-Ward on 20 October 2009 confirming that she was not abandoning her employment, and enclosing documents which Mrs Stewart-Ward had been not able to locate on Ms Dunnings personal file. These included two job descriptions, the delegated authority document, and a memorandum of appointment as Administration Manager.

[26] On 22 October 2009 Ms Dunnings wrote to Mrs Stewart-Ward addressing the issues raised in the letters she had received from her. The letter concluded by asking Mrs Stewart-Ward to remove the written warning and provide an apology. The letter

also requested Mrs Stewart-Ward to arrange a meeting with Ms Dunning with the purpose of discussing “*re-establishing a positive working relationship*”.

[27] Mrs Stewart-Ward responded by a letter dated 29 October 2009. Mrs Stewart-Ward advised that the Trust was not prepared to remove the written warning, but would be referring the matter to the mediation service with a request for mediation. Ms Dunnings was asked to confirm that she would attend mediation.

[28] Ms Dunnings responded by letter dated 5 November 2009, agreeing to attend mediation. However Ms Dunnings received no notification of a mediation date following this letter.

[29] By 11 November, Ms Dunnings’ General Practitioner advised her that she should be fit to return to work by 20 November 2009. As Ms Dunnings had not received any notification of a mediation date, and was concerned about returning to work with the matter of the written warning not resolved, she wrote to Mrs Paul and the Trustees on 11 November 2009. Ms Dunnings requested a meeting with the Trust as her employer prior to her return to work on 20 November 2009, to discuss various matters including the intentions of the Trust Board as regards the future of her position as Administration Manager. Ms Dunnings also requested a copy of the most recent Trust minutes.

[30] Ms Paul said she had received this letter and had arranged for it to be distributed to the other Trustees with the intention of raising it at the next Trust meeting. However before this could take place, Ms Dunnings had been dismissed.

Dismissal

[31] Ms Dunning explained that, as she had been cleared by her doctor to resume work, she had some concern about operational matters, in particular in relation to her position as a co-signatory to the Trusts bank account. Ms Dunnings therefore arranged to meet with Mr John Banbury of Prideaux and Company Ltd, the Trusts Auditor, in order to obtain some independent advice.

[32] At the meeting with Mr Banbury, which took place on 11 November 2009, Mr Banbury said Ms Dunnings raised concerns about Mrs Stewart-Ward’s personal

financial problems which Mrs Stewart-Ward had discussed with her, and asked if she (Ms Dunnings) was still a co-signatory to the Trust bank account. Mr Banbury said he informed Ms Dunning that he did not know if she was still a co-signatory, and advised her to go to Westpac Bank, and ask for this information which she was entitled to receive.

[33] On 12 November 2009 Ms Dunnings went to the Westpac Bank and saw a Business Account Manager with whom she had had previous dealings. The Business Account Manager was able to confirm that Ms Dunnings was still a co-signatory. Ms Dunnings told the Business Account Manager that her password access to the account had been blocked.

[34] Ms Dunnings stated that she did not request information about the Trust's bank balances, but had requested a transaction record as she believed Mr Banbury had told her to obtain a listing of who had authorised recent transactions. Mr Banbury agreed that he may have asked Ms Dunnings to obtain a printout of the signatories.

[35] The Business Account Manager left the meeting for approximately 25 minutes, returning with his Team Leader, Ms Josie Collier. Ms Collier told Ms Dunnings that she would not provide Ms Dunnings with any further information.

[36] Ms Dunnings said she then returned to Mr Banbury's office to report on the information with which she had been provided.

[37] On 12 November 2009 Ms Paul received a telephone call from an employee at Westpac, who informed her that Ms Dunnings was at the bank and had asked if she (Ms Dunnings) was still a co-signatory to the Trust bank account. Mrs Paul said she told the bank employee to contact Mrs Stewart-Ward.

[38] Mrs Stewart-Ward said that the bank had informed her not only that Ms Dunnings had requested information whether or not she was still a co-signatory, but had also asked for a printout of the Trust's business accounts. Following this telephone call, Mrs Stewart-Ward contacted Mr Banbury, who confirmed to her that Ms Dunnings had sought to ascertain if she was still a co-signatory.

[39] Mrs Stewart-Ward contacted Mrs Paul and the decision was made to dismiss Ms Dunnings. Mrs Stewart-Ward prepared a letter of dismissal and Mrs Paul checked it. Mrs Stewart-Ward then hand-delivered the letter dated 20 November 2009 that day.

Determination

[40] Both the decision to provide Ms Dunnings with a written warning which constitutes a disadvantage¹, and the decision to dismiss Ms Dunnings on the basis of serious misconduct, must be justifiable decisions in accordance with the test as set out in s 103A of the Employment Relations Act 2000 (“the Act”). Section 103A of the Act states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, 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”

[41] The decisions must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*² stated:

“That is not to say that the employer’s conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny...”

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

¹ S 103 (1)(b) Employment Relations Act 2000

² [1990] 1 NZILR 35

[42] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

Was Ms Dunnings unjustifiably disadvantaged in her employment with the Trust

[43] At the meeting initiated with Ms Dunnings on 27 August 2009, several changes in procedures were discussed which had the effect of impacting on Ms Dunnings duties and responsibilities. These were set out in the letter dated 2 September 2009. There was no evidence that Ms Dunnings agreement was sought in relation to these changes as was required under Clause 2 of individual employment agreement between Ms Dunnings and the Trust. Clause 2 states:

... these duties may be modified and updated by the employer from time to time following agreement with the employee ..

[44] Following this meeting, Mrs Stewart-Ward stated that she had had a discussion with the Trust Board, which had instructed her to give Ms Dunnings a written warning should there be any further failure to follow instructions in relation to the changes which had been introduced.

[45] Ms Humphrey submitted for the Trust that there had been a strategy developed by the Trust to deal with improving Ms Dunnings performance, but there was no evidence presented to the Authority to support this submission; nor was there any evidence of prior verbal warnings having been given to Ms Dunnings. There was no evidence presented at the Investigation Meeting to support an assertion in submissions for the Trust, that a review of Ms Dunnings's performance had been scheduled.

[46] Additionally, as Ms Dunnings had been absent on sick leave following the meeting on 27 August 2009 when she was informed of the changes, until her return to work on 3 September 2009, there had been no opportunity for her to fail to follow the instructions which she had been given about the new procedures on 27 August 2009.

[47] I find that there was no substantive justification for the written warning having been issued. There was also no adherence to the minimum requirements of procedural fairness: Ms Dunnings was not informed in advance of the meeting on 27 August 2009 of her employer's concerns, she was not offered the opportunity to have representation at the meeting, and there was no opportunity for her to provide any explanation.

[48] I find that the Trust did not act as a fair and reasonable employer in issuing Ms Dunnings with a written warning. I determine that Ms Dunnings was unjustifiably disadvantaged in her employment as a result of the warning.

Was Ms Dunnings unjustifiably dismissed from her employment with the Trust

[49] The dismissal letter dated 20 November 2009 addressed three main areas of concern. Two were of lesser impact in the decision to dismiss and were cited as "failure to follow instructions" and "failure to keep accurate and responsible financial records". I find no procedural justification in raising what were essentially historical issues, given that Ms Dunnings had been absent from her duties since 4 September 2009. There had been no prior discussion with Ms Dunnings about these issues, or the opportunity for her to address them in a properly constituted disciplinary forum.

[50] The third issue, and the one which was held to be "*particularly serious and warrants immediate termination of your employment*", was the incident with the Westpac Bank.

[51] Mrs Paul confirmed in her evidence at the Investigation Meeting that she had a concern that Ms Dunnings might have intended to removed monies to which she was not entitled from the Trust bank account, although there had been no full investigation of the matter.

[52] A fair and reasonable employer would have carried out a full investigation of the matter, which would have involved asking for an explanation from Ms Dunnings and seeking clarification of the meeting between Ms Dunnings and Mr Banbury which took place on 11 November 2009.

[53] Had such a discussion with Mr Banbury taken place, it would have revealed that Ms Dunnings had met with Mr Banbury in order to obtain information on her status as a co-signatory, and that Mr Banbury had advised Ms Dunnings to go to the Westpac Bank and request this information, as she was entitled to do if she was still a co-signatory to the Trust's bank account. Mr Banbury also advised that Ms Dunnings was entitled to know the identity of the other signatories.

[54] In the event of a full investigation, rather than holding that these actions constituted serious misconduct, it would have been open to Mrs Paul and Mrs Stewart-Ward to conclude that Ms Dunnings was behaving diligently in ascertaining her status as a co-signatory prior to resuming her duties at the Trust. Further it would have been open to them to conclude that Ms Dunnings was not only transparent in her actions, but had been acting in accordance with the rights and obligations adhering to her position as a signatory to an organisation's bank account.

[55] The letter to dismiss was implemented by Mrs Stewart-Ward, but was made upon the instruction of Mrs Paul, who stated that the decision was made after consultation with the other Trustees. There was no evidence presented to the Authority to substantiate the statement by Mrs Paul that the other Trustees had been consulted, but Mrs Stewart-Ward was clear about the fact that the decision had not been one which she had made, her role had been to implement the decision by writing and personally hand-delivering the dismissal letter.

[56] Even if the other Trustees had been consulted, they, like Mrs Paul herself, had not heard any explanation from Ms Dunnings prior to the decision to terminate her employment. In the Employment Court case *Ioane v Waitakere City Council*³ Chief Judge Goddard said:⁴

Employers have had ample notice from the Court ... that to be justifiable procedurally, or for that matter substantively, the fair inquiry that must precede every dismissal for cause must be carried out by the decision-maker. Preliminary portions of that investigation can, and in many cases must, be delegated to others. But in the end, the decision-maker must turn his mind not only to what those under him report and recommend, but also to what the employee has to say in reply.

³ [[2003] 1 ERNZ 104

⁴ At para [25]

[57] However not only was Ms Dunnings was not given an opportunity to present an explanation either to Mrs Paul or the other Trustees as decision-makers, she was not given an opportunity to offer an explanation to Mrs Stewart-Ward either. Ms Dunnings was dismissed in a letter delivered to her home address whilst she was still absent from work on sick leave.

[58] I find that in dismissing Ms Dunnings, the Trust did not have substantive grounds for finding serious misconduct, and did not adhere to the basic requirements of procedural fairness, specifically:

- a. Ms Dunnings was not provided with a specific allegation of misconduct or told what the likely consequences would be if the allegations were established;
- b. Ms Dunnings was not provided with a real opportunity to provide an explanation to refute the allegations; and
- c. There was no unbiased consideration of the explanation since no opportunity was given to Ms Dunnings to provide one.

[59] Ms Paul admitted during the Investigation Meeting that the Trust had erred by not giving Ms Dunning the opportunity to provide an explanation, and had acted hastily. It is to be regretted that this insight came too late to provide Ms Dunning with the opportunity to explain her actions.

[60] I find that the Trust departed so far from the basic requirements of procedural fairness as to render the dismissal of Ms Dunnings an unjustifiable dismissal.

Remedies

[61] I find that the Trust did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decision by the Trust to dismiss Ms Dunnings was not a decision an employer acting fairly and reasonably

would have made in all the circumstances. Ms Dunnings has been unjustifiably dismissed and is entitled to remedies.

Reinstatement

[62] Ms Dunnings is seeking reinstatement to her former position. The primary remedy is reinstatement. Section 125 of the Act provides for reinstatement to be ordered, wherever practicable. The Trust has not addressed the issue of practicability of reinstatement, advising that it is unable to do so until such time as the determination of the Authority is issued.

[63] The Trust has been provided with the opportunity to address the issue of practicality of reinstatement fully in submissions. As it has chosen not to avail itself of the opportunity, I conclude that reinstatement is practicable.

[64] Ms Dunnings is to be reinstated to her position as Administration Manager. This to take effect from the date of this determination.

Recommendation

[65] Given the issues that there have been in the relationship between Mrs. Stewart-Ward and Ms Dunnings, I recommend that the parties and their representatives meet at the earliest opportunity to discuss and achieve clarification on such matters as performance standards and operational administrative matters.

Reimbursement of Lost Wages

[66] Ms Dunnings is to be reimbursed for lost earnings from the date the entitlement to paid sick leave expired on 15 October 2009 until the date of reinstatement, with deductions for any monies earned by Ms Dunnings in the way of paid employment or private work during that period. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[67] Ms Dunnings is also entitled to compensation for humiliation and distress. I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Ms Dunnings suffered significant distress, resulting in her being medically unfit to attend work due to a stress induced

condition, and was unable to find alternative employment as soon as she needed to do due to the period required for her recovery.

[68] In respect of the disadvantage grievance, the Trust is to pay Ms Dunnings the sum of \$3,000.00, pursuant to s 123(1) (c) (i).

[69] At the time Ms Dunnings was dismissed, Mrs Paul admitted that the Trust was aware of Ms Dunnings state of health, in particular that Ms Dunnings was suffering from stress; however the Trust, an organisation with a strong awareness of mental health issues, had nonetheless proceeded to instruct Mrs Stewart-Ward to terminate Ms Dunnings employment summarily.

[70] The unfounded accusations that Ms Dunnings may have been intending to remove monies to which she was not entitled from the Trust's bank account, I consider to have had the effect of unjustifiably besmirching Ms Dunnings honesty and to have compounded her feelings of hurt and humiliation.

[71] In respect of the dismissal grievance, the Trust is to pay Ms Dunnings the sum of \$10,000.00, pursuant to s 123(1) (c) (i).

[72] I have considered the matter of contribution as I am required to do under s124. Ms Dunnings did not contribute to either of the situations which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[68] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority