

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 169
5310978

BETWEEN	JENNIFER GINI Applicant
AND	LITERACY TRAINING LIMITED First Respondent
AND	LINDA STURGESS Second Respondent

Member of Authority: G J Wood

Representatives: Patrick O'Sullivan, for the Applicant
Susan-Jane Davies, for the First Respondent
Tim Cleary, for the Second Respondent

Investigation Meeting: 11 May 2011 at Wellington

Submissions Received: By 7 June 2011

Determination: 3 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Jennifer Gini, claims that she was unjustifiably dismissed from her role as a literacy tutor at Wellington Prison. She also claims that the respondent (Literacy Training) breached its obligations of good faith to her. Ms Gini also claims a penalty against Ms Sturgess, the managing director of Literacy Training, for inciting, instigating, aiding or abetting breaches of her employment agreement by Literacy Training.

[2] Literacy Training claims that Ms Gini was justifiably dismissed for serious misconduct following a full and fair investigation. Ms Sturgess denies the claims

against her and further considers that the application for penalty has been brought out of time and should therefore be dismissed.

Factual discussion

[3] Literacy Training Limited, as its name implies, provides literacy training services, as well as numeracy skills and life skills training services. It is owned by a trust and its sole director is Ms Linda Sturgess, the second respondent. Ms Gini was one of over 30 literacy tutors employed by Literacy Training to provide such services within prisons to prison inmates. Ms Gini was employed at Arohata and Mt Crawford Prisons, teaching foundation skills. She commenced employment on 8 May 2009 and by the end of her employment was being paid around \$780 per week gross.

[4] Obviously security and safety of staff was paramount for Literacy Training, given the prison environment. Ms Gini was given training on how to keep herself safe and not to be “got” by inmates. This was particularly important for Ms Sturgess and Literacy Training, as staff had previously had their safety put seriously at risk. Equally obviously, when in the prison Ms Gini had to follow the instructions of prison service staff, and to follow its code of conduct, which she was provided with.

[5] Ms Gini was also covered by a written employment agreement. Under that employment agreement she was required to notify Literacy Training as soon as she became “*aware of any event, incident or information that may affect their employment within prison sites. Failure to do so might be deemed as misconduct*”. Ms Gini was also prohibited from personally retaining any records pertaining to her teaching in prison sites. Ms Gini was also made aware that it was contrary to law to take anything out of the prison for a prisoner.

[6] In September 2009, Ms Gini was principally involved in teaching the foundation skills programme at Mt Crawford, one of the modules of which was *W19 - Running a Budget*. The module was designed to incorporate foundation learning and foundation numeracy competencies within the context of real life situations, including authentic tasks that are associated with running a budget. Ms Gini introduced the concept of Kiwisaver to prisoners on the course, as a way of demonstrating to them how they could get ahead without breaking the law, and as a practical way of improving their financial literacy. To assist with practical aspects of the course, she brought in some Kiwisaver application forms from a particular provider. This sparked

the interest of at least two prisoners, who attempted to start the enrolment process for Kiwisaver with that provider, by filling in the forms. On the day this occurred Ms Gini took the partially completed forms back out of the prison with her along with all the other materials she had brought in, for safety reasons.

[7] The removal of the Kiwisaver forms caused concern to one of the unit managers at Wellington Prison, when it came to his attention, because he considered that Ms Gini may have taken personal material about the prisoners out of the prison. The unit manager was also concerned about Ms Gini using the prison photocopier for a large amount of material, and using prison markers, pens and the like rather than them being provided by Literacy Training. He also raised a concern with the Prison Service's liaison person with Literacy Training about why Ms Gini had not mentioned that she had noticed prisoners looking at the roof which, if passed on, could have provided intelligence about possible future prison escapes. The two prison staff involved were concerned that while no doubt done for genuine reasons, Ms Gini's actions could have placed her at risk, and that the threat of a complaint by a prisoner could have been generated to pressure her into assisting prisoners in an unlawful way.

[8] The Unit Manager had already discussed these matters with Ms Gini. Ms Gini did not immediately inform her managers of any of them because the Unit Manager had made it clear that it would be taken up forthwith through the normal communication channels between the Prison Service and Literacy Training, which is what occurred.

[9] A memo followed to Literacy Training to ask it to meet with Ms Gini, suggesting that she be replaced at Wellington and Arohata Prisons but work instead at Rimutaka Prison, where there was more support and supervision available. The memo concluded by stating that the Prison Service believed that Ms Gini may have breached the contract she had with Literacy Training, so it was supportive of whatever disciplinary action Literacy Training felt appropriate.

[10] Literacy Training's Operations Manager met with Ms Gini on 21 September 2009 about these issues. The Prison Service letter was read to Ms Gini at the meeting. Ms Gini accepted that she had promoted Kiwisaver to the prisoners and had taken two partially completed forms home. She also accepted that she had used the prison photocopier and stationery supplies for her work in the prison. In addition, she also

accepted that she could have mentioned the issue about prisoners looking at the roof, but did not think anything of it at the time.

[11] Ms Gini was also advised about the loss of a teaching journal, which she thought may have been taken by a student, but yet she had not completed an incident form and sent it back to the office as required. Ms Gini had filled in the form, but had not returned it.

[12] These matters were of such concern to Literacy Training that it decided to hold a disciplinary meeting. The meeting was to cover the following matters:

1. *Failure to comply with the requirement to report any event, incident or information which may affect your employment with Literacy Training Limited management. It is of concern that even after being reminded of the need to report all incidents after your journal was stolen that you appear not to have complied with this request.*
2. *Non compliance to the following of company policies and procedures.*
3. *Using a document in an unauthorised way – You issued documents to learners to complete that were not pertaining to the purpose of your employment with Literacy Training Limited. You then proceeded to remove these documents from the site when they contained personal information about the prisoners.*
4. *Acting in a way that could compromise not only your safety but also that of your colleagues.*

[13] Ms Gini responded to the letter, stating that the Operations Manager had accepted there was nothing malicious about the Kiwisaver forms, so she could not see the purpose in that matter being pursued. She also noted that she could not have sent an incident report over the missing journal because she still did not know whether it had been stolen (in fact it later turned up at her house). Ms Gini also noted that the Kiwisaver documents were basically numeracy oriented, as had already been accepted by Literacy Training. She denied compromising safety because the documents were in her possession for security, “*as there are no locks in the cabinets in the room and other groups go in there*”. Ms Gini wanted more detail before she could participate in an investigatory disciplinary meeting under these circumstances.

[14] The Operations Manager replied stating that while her intention may not have been to breach security or confidentiality standards, removal of documentation

containing prisoners' details was in breach of her employment agreement where Literacy Training had not given her specific authorisation to do so. It was re-emphasised that she should have let Literacy Training know immediately that she had been spoken to by the prison management about the issues it had.

[15] Ms Sturgess and the Operations Manager held a meeting with Ms Gini on 29 September. Ms Gini had a support person present. At the meeting, Ms Gini informed Literacy Training that she had used the Kiwisaver booklets (which contained application forms in them) to teach numeracy skills and to show prisoners how they could get ahead in life without breaking the law.

[16] The meeting then digressed into a long and unhelpful discussion about what module Ms Gini was teaching at the time. It seemed to be held against Ms Gini that she could not point out what the module was. It was not until the investigation meeting had almost commenced that a copy of the module *W19 - Running a Budget*, which Ms Gini was responsible for teaching at the time, was able to be provided to the Authority.

[17] Ms Gini was then asked what she would have done with any completed forms and she said she would have to give them to prison administration staff. When asked where authority from Literacy Training for this activity came from, she replied that it was an activity that related to the course she was teaching.

[18] Ms Gini was reminded that she was not allowed to take out any extra material that she did not take into the prison (and vice versa), without direct authorisation from Literacy Training. Ms Gini did not recall such an instruction.

[19] Ms Gini was then asked why she did not complete an incident report when the Unit Manager spoke to her about his concerns. Her response was that the Unit Manager had told her that she should not have to pay for her own photocopying and stationery, that he said he would ring her boss and clarify matters and that in fact he did so while she was standing there. On that basis, she believed there was no way she could have informed Literacy Training before it knew of the issues, and there was no point in doing one later, because Literacy Training was already aware of the issues.

[20] Matters then turned again to taking items out of the prison. Ms Gini believed that she was simply trying to keep such items secure. She accepted, however, that rather than trying to assist the prisoners with the process, it would have been better, in

retrospect, to have handed the documents over to the prison administration. Ms Gini also accepted that in retrospect she would certainly do things in a different way, particularly as the prison was highly sensitive at the moment because of a recent escape. It was clear that she would not do something like that again. Matters then went back to the name of the module and its exact title again, with Ms Gini responding that it was a budgeting module.

[21] On 1 October the Operations Manager phoned Ms Gini telling her she was to be summarily dismissed with effect from the next day. A letter giving Literacy Training's reasons followed. The letter does not set out any analysis of the numerous breaches of Ms Gini's employment agreement that Literacy Training claimed had occurred, except to state:

As the above conditions of your employment agreement have not been adhered to by your actions over completion of and removal of prisoner completed Kiwisaver forms and failure to take responsibility to notify us when spoken to by a senior staff member of the Prison Service, Literacy Training Limited management find we have now lost trust and confidence in you as an employee and have decided to terminate your employment with Literacy Training Limited.

Your failure to follow fair and reasonable instructions and your non-compliance to follow company policies and procedures, leaves Literacy Training Limited management to advise you that your employment is to be terminated as of tomorrow Friday 2nd October 2009.

[22] Ms Gini made it clear at the time that she did not agree with the dismissal and that she considered that Literacy Training and Ms Sturgess had not acted in good faith towards her. On 8 December 2009 she raised a personal grievance. The letter of grievance did not raise a penalty.

[23] On 30 June 2010 Literacy Training lost its contracts with the Prison Service, leading to the loss of jobs for the vast majority of Literacy Training's tutors.

[24] Ms Gini filed her claims against Literacy Training and Ms Sturgess in the Authority on 17 November 2010. As the matters have been unable to be resolved, it falls to the Authority to make a determination.

The Law

[25] The standard of proof involving cases of alleged serious misconduct must be consistent with the gravity of the allegations. Thus the degree of evidence required to

support an allegation will be influenced by the potential consequences for all concerned should the allegation be proved, and that is why the civil standard of proof is flexible (*Managh (t/a Managh & Associates) and Café Down Under Ltd v Wallington* [1998] 2 ERNZ 337 (CA)).

[26] The workplace context must be considered in a claim for unjustified dismissal. As was held in *Arthur D Riley & Co v. Wood* [2008] ERNZ 462 at [54]:

The test is not that the dismissal is judged according to the standards of an impartial observer. Section 103A recognises that the circumstances of an employment environment are a factor to be considered. This means that the standards of what is fair and reasonable may be variable according to the circumstances and a fair and reasonable employer may not necessarily be totally impartial or neutral. Of necessity employers bring to their decisions the values, culture and expectations of their specific work place. They must weight the impact of the behaviour of an employee under investigation on other employees and the work environment generally.

Determination – First Respondent

[27] I accept that Literacy Training was very concerned for the safety of its entire staff, including Ms Gini. I also accept that it investigated Ms Gini's conduct for sound reasons, namely that concerns had come to its attention from the Prison Service.

[28] Furthermore, I also accept that the process that Literacy Training adopted was not, considered overall, unfair to Ms Gini except for the fact that Literacy Training did not seem to appreciate, perhaps because Ms Gini could not directly point out at the time what course she was running, that the provision of the Kiwisaver material was entirely appropriate material to be used in conjunction with the other set materials for the *W19 - Running a Budget* course.

[29] This, combined with the perceived pressure from Prison Service staff over Ms Gini's behaviour, may well have been the major contributors to a decision that I conclude a fair and reasonable employer would not have made. As indicated above, there is a need where there are serious allegations being made, such as breaching prison regulations, for there to be a corresponding standard of proof. While I accept that gross negligence might constitute reasons for serious misconduct, here no fair and reasonable employer would conclude that Ms Gini's failings, if any, had reached such a threshold. As Ms Davies made clear on its behalf, the major issues for Literacy

Training were first that Ms Gini was acting in a way that would compromise not only her own safety but the safety of others, by taking such forms out of the prison, and second, by failing to report an incident. Clearly the issues around photocopying and use of Prison Service stationery were not matters that could ever constitute serious misconduct, and therefore could not and were not taken into account by Literacy Training.

[30] It is my conclusion that no fair and reasonable employer would have dismissed Ms Gini for any or all of the defaults that Literacy Training laid at her feet, if they were defaults. First, it was clearly appropriate teaching practice for Ms Gini to use Kiwisaver information and Kiwisaver application forms to promote numeracy amongst prisoners. That could never form part of a reason for dismissal by a fair and reasonable employer.

[31] Second, Literacy Training should have accepted Ms Gini's explanation that she took the forms out of the prison for safety purposes. There was nowhere that she could have left them, other than perhaps with prison office administration. To dismiss an employee for doing something as minor as that are not the actions of a fair and reasonable employer. Even despite the dangers of the prison environment, Ms Gini had not committed any misconduct in taking these forms out for safety and she certainly did not have any intention to do so, which is usually a requirement for serious misconduct. Furthermore, I do not accept that she did a favour for the prisoner whose form she took out. She did him neither a service nor a disservice by holding onto the forms in the interim. I am confident that had Literacy Training informed Prison Service management of Ms Gini's reasons for her actions and her commitment not to take such actions again, it would have been satisfied.

[32] Third, Ms Gini had been told by a senior manager in the Prison Service that he was about to immediately inform Literacy Training management of his concerns. In those circumstances, it was entirely reasonable for Ms Gini to not fill in an incident report, which in any event she quite genuinely thought related more to health and safety type incidents. For Literacy Training to take such a negative view of this lack of action was quite unreasonable.

[33] Fourth, and finally, a claim later came to light that Ms Gini was pursuing a social agenda that put her at risk. While her being taken advantage of or "got" by the prisoners appears to have been of genuine concern to Literacy Training, it would have

needed greater evidence of Ms Gini actively pursuing such an agenda in breach of her employment obligations (which did not exist here) for it to justify dismissal.

[34] It therefore follows, given that Literacy Training can not justify any of the reasons for Ms Gini's dismissal, that her dismissal must be found to be unjustifiable.

Remedies

[35] I accept that Ms Gini was earning \$780 per week gross at the time she lost her job, because of the number of modules she was teaching at the time. I also accept that she has made reasonable attempts to mitigate her loss by looking for alternative employment. She did obtain some alternative employment, but that work did not last.

[36] In all the circumstances of this case, I consider that Ms Gini is entitled to three months' lost remuneration, but find no reason to extend that, given the fact that she did get some other work and could not have done both jobs at the same time. Her lost remuneration therefore totals \$10,140 gross.

[37] While Ms Gini gave little direct evidence of hurt and humiliation, it was clear from the record of the disciplinary meeting that the whole experience was very negative for her and had upset her very much. It was also patently clear from the investigation meeting that Ms Gini has been considerably upset at how she has been treated. In all the circumstances of this case I consider compensation in the sum of \$5,000 is appropriate.

[38] Given that none of the claims against Ms Gini have been upheld at the investigation meeting, there can be no room for contribution by Ms Gini. Even though she accepted that she would have done things differently in hindsight, particularly in relation to taking out the forms, that is a minor error that any employee could make and is not blameworthy behaviour worthy of a reduction in remedies.

[39] I therefore make no deduction for contribution, as Ms Gini was not responsible for the decisions Literacy Training made, which were not those of a fair and reasonable employer.

[40] Given my awarding of substantial remedies to Ms Gini following her unjustifiable dismissal, there is no need to provide overlapping remedies in respect of

Literacy Training's clear breaches of good faith to her, all of which are encompassed in my finding of an unjustified dismissal.

Determination – Second Respondent

[41] Section 135(5) of the Act provides that:

An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of-

- (a) the date when the cause of action first became known to the person bringing the action; or*
- (b) the date when the cause of action should reasonably have become known to the person bringing the action.*

[42] The claims of aiding and abetting breaches of contract by Ms Sturgess were known by Ms Gini at the time of her dismissal, which she contested virtually immediately as being unfair. She has always laid responsibility for the decision to dismiss her with Ms Sturgess. Despite that, when the grievance was raised no penalty claims were raised. In fact the first time the penalty was raised was with the filing of the statement of problem in the Authority on 17 November 2010. This is well beyond a year. Such time limits should not be extended given that penalties are quasi-criminal proceedings in nature.

[43] There is no doubt in this case that Ms Gini knew or ought to have known of the cause of action once she had been dismissed. It is not necessary for her to know that what happened to her constituted an action that could be brought as a penalty. As was held in *Wyatt v. Simpson Grierson* [2007] ERNZ 489, a cause of action accrues when all the necessary constituents of the cause of action come into existence. The test here is different to that of raising a personal grievance, which involves a different statutory test.

[44] Ms Gini was aware of all the relevant facts that she now relies on at the time of her dismissal. She had 12 months to claim a penalty against Ms Sturgess, but for whatever reason did not do so. Accordingly, her claim is out of time and must be dismissed.

Conclusion

[45] Ms Gini has been unjustifiably dismissed and thus also not treated in good faith by Literacy Training. I therefore determine that the respondent, Literacy

Training Limited, is to pay to the applicant, Ms Jennifer Gini, the sum of \$10,140 gross in lost remuneration and \$5,000 in compensation. Ms Gini's claim for a penalty against Ms Sturgess is dismissed.

Costs

[46] Costs are reserved.

G J Wood
Member of the Employment Relations Authority