

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Colin Griffiths (Applicant)
AND Department of Corrections (Respondent)
REPRESENTATIVES Ken Nicholson, Counsel for the applicant
Jennifer Mills, Counsel for the respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 12 May 2005
13 May 2005
SUBMISSIONS RECEIVED 3, 27 June and 19 July 2005
DATE OF DETERMINATION 13 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Colin Griffiths was employed by the Department of Corrections (“Corrections”) from 1989 until his dismissal for serious misconduct on 20 April 2001. Mr Griffiths worked in the Whangarei office of the community probation service as a parole officer and from June 2000 until his dismissal in the role of service manager. As service manager Mr Griffiths had a number of staff who reported directly to him. In early February 2001 Mr Griffiths began a brief affair with one of those staff members. The affair ended in mid-February 2001. Mr Griffiths took pre-arranged annual leave from 22 February until 13 March 2001. On his return from annual leave Mr Griffiths was advised of allegations of serious misconduct and an investigation into those allegations proceeded through March and April 2001. The investigation concerned Mr Griffiths alleged failure to disclose the affair, his alleged falsification of an accident report (the falsification of which was related to the affair) and the alleged misuse of a Corrections vehicle.

[2] Mr Griffiths says his dismissal was both procedurally and substantively unjustified and says he was treated differently to employees in similar situations. He seeks reinstatement to the position he held at the date of dismissal, but has indicated his willingness to be located other than Whangarei, reimbursement of lost wages and bonus and compensation for hurt and humiliation to the sum of \$30,000.

[3] Corrections say Mr Griffiths’ dismissal was fair and reasonable in all the circumstances.

[4] To resolve this employment relationship problem the Authority must firstly determine the grounds of dismissal and secondly decide if the decision to dismiss Mr Griffiths was reasonable in all the circumstances including whether Mr Griffiths was treated differently from other Corrections employees in similar circumstances.

Non-publication orders

[5] At the investigation meeting Ms Mills applied for a non-publication order of the name of the Corrections employee with whom Mr Griffiths had an affair and the name of the Corrections employees whose disciplinary record has been raised by Mr Griffiths in support of his claim of disparity of treatment. These individuals did not give evidence to the Authority.

[6] Mr Nicholson initially indicated he did not object to Ms Mills' application but later advised he sought to have non-publication apply to the applicant's name on the same basis.

[7] Subsequent to the investigation meeting Ms Mills has filed written submissions in support of her application.

[8] To determine this employment relationship problem it is unnecessary to name the Corrections employees involved other than those who gave evidence to the Authority, namely Mr Griffiths and the decision-maker Mr Attwood. The non-publication orders sought by Ms Mills are declined as are those sought by Mr Nicholson.

Issues

(i) The grounds of dismissal

[9] Mr Griffiths says Corrections' decision to dismiss him was based only on the allegation of failing to declare the relationship with an employee with whom he had a reporting relationship. He relies on the letter dated 20 April 2001 under the name of the investigator, Gordon Attwood, Regional Manager, Community Probation service:

“Outcome of investigation

...

I have carefully considered your submissions, and have decided that there is insufficient evidence to uphold a finding of serious misconduct in relation to allegation one (misuse of departmental vehicle). However, I do not accept that your failure to notify Ms Pitman of your relationship with [co-worker] amounted to an error of judgment, and should not attract a sanction. In my view, your failure breached the Second Principle of the code of conduct, and amounted to serious misconduct.

...”

[10] Mr Attwood says his letter of 20 April concerned penalty and must be read with the investigation report dated 5 April 2001. The investigation report upheld all three allegations against Mr Griffiths, made a preliminary recommendation that Mr Griffiths' should be summarily dismissed and invited submissions from Mr Griffiths on penalty.

[11] The final submissions made on Mr Griffiths' behalf concern all the allegations and submit that the appropriate remedy would be a final written warning. Following receipt of Mr Griffiths' submissions on penalty the 19 April dismissal letter was written.

[12] Mr Nicholson wrote to Corrections on 7 June 2001 raising a personal grievance on Mr Griffiths' behalf. This letter sets out the reasons for dismissal which include the falsification of a document. In light of this letter, written on instruction from Mr Griffiths, I am satisfied Mr Griffiths understood the reasons for his dismissal were the finding of serious misconduct in relation to falsification of an accident form and failure to disclose a personal relationship.

(ii) Dismissal reasonable in all the circumstances?

[13] Mr Griffiths' says his dismissal was unjustified because there is no reasonable basis upon which Corrections could conclude his failure to disclose the relationship with a co-worker with whom he had a reporting relationship had destroyed the relationship of trust and confidence with Corrections. He raises the following grounds:

- (i) the policy Corrections sought to rely on was incorrectly applied – the policy is a recommendation rather than a strict policy;
- (ii) Mr Griffiths' failure to disclose the relationship does not amount to serious misconduct because once the relationship had been disclosed by the co-worker involved the obligation on Mr Griffiths to tell his manager was lifted;
- (iii) Mr Griffiths' explanation for his failure to report the relationship was reasonable given the delicate nature of the situation and the short duration of the relationship;
- (iv) this was a “one-off” situation;
- (v) the use of the policy was a pretext to advance Correction's suspicion that Mr Griffiths had sexually harassed the co-worker involved;
- (vi) the falsification of the document was misconduct which did not warrant dismissal; and
- (vii) dismissal was a harsh and unreasonable penalty in the particular circumstances of this matter.

[14] Mr Griffiths is also critical of the process used by Corrections to investigate the allegations of serious misconduct. He says the process was flawed in that:

- (i) irrelevant considerations improperly influenced the decision maker - Mr Attwood was concerned the co-worker involved may make a complaint of sexual harassment in relation to Mr Griffith's conduct towards her;
- (ii) the decision to dismiss was predetermined - Mr Griffiths was suspended and a preliminary view was formed before final submissions were made on Mr Griffiths' behalf;
- (iii) Mr Griffiths did not have access to proper representation until the final meeting – at the first disciplinary meeting Mr Griffiths' PSA representative said he could not speak on his behalf because he was also representing the co-worker involved;
- (iv) Corrections failed to provide relevant material – Correction's notes of the first disciplinary meeting were not made available to Mr Griffiths until the third disciplinary meeting;
- (v) Corrections failed to make Mr Griffiths fully aware of the disciplinary process to be used;
- (vi) Mr Griffiths was not given a fair hearing – his explanation as to the delay in disclosing the relationship to his manager was not put to the co-worker involved and insufficient weight was put on Mr Griffiths' disclosure of the relationship to his external supervisor;
- (vii) the investigation was unnecessarily lengthy.

[15] The allegations of serious misconduct against Mr Griffiths are set out in a document entitled “Department of Corrections Code of Conduct”. Mr Griffiths accepted this document formed part of his terms of employment. The relevant parts of the code of conduct are:

“SECOND PRINCIPLE:

Employees should perform their duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and clients.

This principle covers your general obligation to provide quality service, to respect the rights of colleagues and

clients, and to refrain from conduct that might lead to conflicts of interest or your integrity being compromised.

Performance of duties

You should carry out your duties in an efficient and competent manner in compliance with the policies and prescribed operating standards and procedures of the Department.

You are expected to:

...

- *not give any false information or make any false declaration*

...

- *ensure that any personal relationships you have in the workplace – such as having a family member or partner working in the same office, or elsewhere in the Department – do not affect your work or that of others. Talk to your manager about any relationship that has the potential to affect your work or that of others.*

...

Examples of Serious Misconduct

...

- dishonesty in the workplace

...

- failure to comply with any of the Department's safety rules or procedures

..."

[16] On 12 March 2001 Mr Griffiths received a letter from Mr Attwood advising Corrections had received allegations of misconduct regarding his conduct. The letter set out the allegations, advised that a formal investigation into the allegations would be conducted and that it was likely the alleged misconduct would constitute serious misconduct under the second principle of the code of conduct. The letter went on to outline the process to be used in the investigation and advised Mr Griffiths he was placed on special leave pending the outcome of a meeting on 19 March 2001 at which Mr Attwood would consider the question of suspending Mr Griffiths. Mr Griffiths was invited to attend the meeting with a representative, make submissions on the proposed suspension and give a preliminary response to the allegations. The letter went on to remind Mr Griffiths EAP services were available to him if he wished and invited him to contact Mr Attwood for clarification. The letter was delivered to Mr Griffiths by his manager, Lisa Pitman. As she was leaving Mr Griffiths said in reference to the situation "what a mess" and Ms Pitman replied "you knew what you were doing." Mr Griffiths said he was dismayed by this comment and that it set the tone for the whole investigation. Ms Pitman was not a decision-maker in the subsequent disciplinary investigation.

[17] The meeting on 19 March 2001 proceeded as scheduled. Mr Griffiths was advised by his union representative that he could only be present as a support person because he was also supporting the co-worker. Mr Griffiths choose to continue with the meeting.

[18] By 5 April 2001 Mr Attwood had completed the investigation into the allegations against Mr Griffith. He had interviewed Mr Griffiths and the co-worker concerned along with a number of other employees whose information took the investigation no further. A copy of the report was provided to Mr Griffiths for comment. The report outlined the investigation process, summarised the interviews and set out the basis of Mr Attwood's findings, which upheld the allegations. Mr Attwood's preliminary recommendation as to penalty was summary dismissal. Mr Griffiths was invited to comment on that recommendation.

[19] Mr Griffiths' union representative filed written submissions as to penalty on his behalf and a meeting was held on 19 April at which submissions on penalty were put to the decision-maker, Mr Attwood. In relation to the allegations of falsifying documents and failure to disclose a relationship the submissions were essentially that Mr Griffiths' conduct should be characterised as an error of judgement and a final written warning should be issued.

[20] Mr Griffiths was advised of the decision to dismiss him by letter dated 20 April having elected to receive the advice as to penalty by letter rather than attend a further meeting.

- **allegation 1 - false declaration**

[21] Mr Attwood's report recorded that Mr Griffiths accepted falsely recording the address on the accident form at the first disciplinary interview and admitted falsifying the time at the second interview. The co-worker said the accident occurred on a day Mr Griffiths was not rostered to work and Mr Griffiths said the accident had occurred on a day he was rostered to work. Mr Attwood concluded that because Mr Griffiths had accepted falsifying the document in two respects it was likely he had falsified the date of the accident to coincide with a recorded trip to the office. Further, Mr Attwood found such a lie created a pecuniary advantage for Mr Griffiths because it avoided any personal liability for the costs.

[22] Where these conclusions open to open to Mr Attwood?

[23] Over the course of the first two disciplinary interviews Mr Griffiths admitted falsely filling out the accident report form to conceal the location of the accident and the time of the accident. Mr Griffiths said he did not give all the details of falsification at the first interview because he answered specific questions and the extent of falsification was obvious from the answers given. I find the failure to provide Mr Griffiths with copies of the interview notes between the first two investigation meetings did not taint the process to a significant degree because Mr Griffiths had an opportunity to rectify any negative inference drawn by Mr Attwood following receipt of his report.

[24] Given that Mr Griffiths had admitted falsifying the accident report in two respects to conceal the relationship with a co-worker it was open to Mr Attwood to conclude that it was in Mr Griffiths' interests to lie about the date of the accident to coincide with authorised work use because he would not then be liable for the costs of the repairs. While it may not have been Mr Griffiths' intention to lie to avoid the costs of repair, this was an obvious consequence of the falsification. The obligation on the decision-maker was to form conclusions which were reasonably open to him having conducted a fair and reasonable inquiry into the allegation. I find this conclusion was open to Mr Attwood.

- **allegation 2 – failure to disclose a relationship with a subordinate**

[25] In his report Mr Attwood recorded that Mr Griffiths had admitted not telling his manager about the relationship but that this was because the relationship was of short duration and unstable, he wanted to discuss with the co-worker involved how to disclose the relationship to his manager and that discussion could not be concluded until his return from leave. Mr Attwood noted the co-worker involved was in a direct reporting relationship with Mr Griffiths and the relationship exposed Mr Griffiths and Corrections to the risk of a claim of sexual harassment. Mr Attwood also noted Mr Griffiths' manager raised with him the day before he went on leave the co-worker's uncharacteristic behaviour and asked him to look into it. Further, Mr Attwood noted this prompt provided Mr Griffiths with an ideal opportunity to disclose the relationship to his manager.

[26] Mr Attwood concluded the only reasonable explanation for Mr Griffiths' failure to disclose the relationship to his manager when prompted must have been a vested interest in keeping the relationship undisclosed because disclosure at this point would highlight Mr Griffiths' failure to disclose the relationship before it affected the workplace.

[27] Was this conclusion open to Mr Attwood?

[28] There is no dispute Mr Griffiths did not disclose his relationship with the co-worker to Corrections. Did this failure amount to a breach of the code of conduct? The code of conduct requires employees to ensure personal relationships do not affect their work or that of others. Mr Griffiths says it was reasonable for him to falsify the accident report and not disclose the relationship prior to his return from annual leave given the circumstances of the relationship. He says the co-worker's behaviour towards her daughter was abusive and when he raised his concerns with her about this she became angry with him and threatened him with violence. Mr Griffiths said he did not report his concerns about the daughter because he did not think she was in any threat of real physical harm. He also says he disclosed the relationship to his external supervisor and this should have been given more weight by the decision-maker.

[29] The relationship Mr Griffiths entered with the co-worker with whom he had a reporting relationship, albeit brief, impacted on Mr Griffiths' work to a significant degree. It led him to falsify an accident report and not respond to a direct inquiry from his manager regarding the observed uncharacteristic conduct of the co-worker. Mr Griffiths' motivation for not being up front with his manager about the relationship, taking steps to conceal that relationship by falsifying an accident report and not responding directly to a direct inquiry about the co-worker's conduct was at the expense of his obligations to his employer. These obligations are clearly set out in the code of conduct. The disclosure of the relationship to the external supervisor was not disclosure to the employer; that Mr Griffiths raised this issue with his supervisor emphasises the obvious difficulty this relationship brought to his employment relationship with Corrections.

[30] It was open to Mr Attwood to conclude that Mr Griffiths' failure to disclose the relationship with a co-worker with whom he had a reporting relationship breached the code of conduct.

- **perceived risk of sexual harassment complaint**

[31] Mr Griffiths told me during the investigation meeting that Mr Attwood's inquiry characterised him as predatory and he was deeply offended by this. His concern was based on notes of Mr Attwood's meeting with one of the employees interviewed in the investigation who described the co-worker as a "victim", some comments made by the co-worker to Mr Attwood during his inquiry regarding the content of telephone calls made by Mr Griffiths' to the co-worker from Australia and Mr Attwood's comments in his report that a risk of a claim of sexual harassment against Corrections may exist.

[32] Mr Attwood's decision-making process is set out in the 5 April report. There is no evidence that the perceived risk of a sexual harassment claim was a factor weighed by Mr Attwood in that decision-making process. What Mr Attwood weighed in his decision making was that the risk of a sexual harassment complaint should have been understood by Mr Griffiths given the power imbalance between himself and the co-worker and he should have taken reasonable steps to address those issues by disclosing the relationship at an early stage. Given the circumstances this was a reasonable factor for the decision maker to consider.

(iii) disparity of treatment

[33] Mr Griffiths says the decision to dismiss him was unfair given other Corrections' employees in similar circumstances have not been dismissed. These examples of alleged disparity of treatment were not raised during the disciplinary investigation.

- **the co-worker**

[34] Corrections did not take any disciplinary action against the co-worker. Mr Attwood told me

this was because she was in a reporting relationship with Mr Griffiths. I do not accept the co-worker's position was similar to Mr Griffiths'; she was in a reporting relationship with him and the investigation showed she had discussed with him what they should do about the relationship and its impact on the workplace. The co-worker complied with the code of conduct by discussing with her manager (Mr Griffiths) what they would do about their relationship and the impact on the workplace. Their different treatment does not occasion a disparity which unfairly disadvantaged Mr Griffiths.

- **1999 breaches of the code of conduct**

[35] In 1999 allegations of breaches of the code of conduct were upheld against two former colleagues of Mr Griffiths. They were not dismissed, but received written warnings. Mr Griffiths says the decision to dismiss him was unfair given the lesser disciplinary action meted out to these other two employees.

[36] To establish disparity of treatment Mr Griffiths must first show the circumstances occasioning the disciplinary action were similar, second that he has been treated differently and third that that difference is unfair to the extent that it renders his dismissal unreasonable in all the circumstances¹. Corrections has provided an explanation for any apparent disparity between the handling of the matters; it says there is no disparity because the first employee was found guilty of misconduct and the finding of serious misconduct in relation to the second employee was at the lower end of the scale. I have examined the information provided regarding the disciplinary action taken against the two employees in 1999. I do not agree the circumstances of their treatment and that of Mr Griffiths' meet the test for disparity of treatment. The factual matrix of the allegations cannot be said to be similar. The claim of disparity fails on the first leg of *Samu*. An explanation for the disciplinary action taken has been provided which has not been challenged.

Determination

[37] I am satisfied on the evidence received that Mr Attwood's investigation was conducted in a fair and reasonable manner. Specific allegations were fairly put to Mr Griffiths to which he was given a full opportunity to respond. Mr Attwood's report demonstrates Mr Griffiths' responses were fully considered. Mr Griffiths has raised a number of concerns about the manner in which the investigation was conducted which are listed above. I am not satisfied that those areas of concern disadvantaged Mr Griffiths' ability to respond fully to the allegations or tainted the investigation process to such a degree that the outcome could not be said to be one open to Mr Attwood.

[38] Mr Griffiths has also said the decision to dismiss him was unjustified because the code of conduct is not strict and given the circumstances of his situation the decision to dismiss was harsh. The code of conduct does not ban personal relationships in the workplace. The code of conduct creates an obligation on employees not to allow personal relationships to impact on the workplace in a way that would create a conflict of interest or compromise their integrity. The code of conduct goes on to set out a process for raising any potential impact on the workplace with the manager.

[39] Mr Griffiths' affair with a co-worker with whom he had a reporting relationship had the potential to impact on the workplace. Mr Griffiths said he had been aware since the proceeding Christmas that the relationship could develop into an affair. Notwithstanding this apprehension Mr Griffiths took no steps to discuss the potential impact with his manager and after the relationship had developed into an affair the investigation fairly concluded Mr Griffiths took deliberate steps to conceal it by falsifying the accident report and not responding directly to his manager when the co-

¹ *Samu v Air New Zealand* [1995] 1 ERNZ 636

worker's uncharacteristic behaviour was raised with him. Having fairly heard and considered Mr Griffiths explanations I find it was open for Corrections to conclude Mr Griffiths' conduct had damaged the employment relationship to such a degree that dismissal was a penalty reasonably open to the employer.

[40] For these reasons I find Mr Griffiths' dismissal was justified.

Costs

[41] The issue of costs is reserved. I invite the parties to attempt to resolve this issue themselves. If they are unable to do so they may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority