

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Stephanie Hill (Applicant)  
**AND** Housing New Zealand (Respondent)  
**REPRESENTATIVES** Anna Fitzgibbon, Counsel for Applicant  
Michael Quigg, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 19 April 2001  
20 April 2001  
**DATE OF DETERMINATION** 14 May 2001

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

Housing New Zealand dismissed Stephanie Hill summarily on 21 March 2000 because it lost trust and confidence in her following her denials of authorship of an anonymous letter, which she later admitted writing, and because of the contents of the letter.

Ms Hill has submitted personal grievances in respect of:

- (a) her suspension, which was imposed in the week before her dismissal; and
- (b) her dismissal.

She seeks reinstatement. There has also been an application for interim reinstatement, but since the substantive matter could be dealt with promptly the parties were able to reach an interim arrangement without the need for a formal order.

**Background**

Ms Hill worked at an area office of Housing New Zealand. She reported directly to her Area Manager ("D"), who in turn reported to the Regional Manager, Lorraine Tomlinson. Ms Hill's partner was employed as an Area Manager at another office in the same region. Ms Hill had 13 years' service with Housing New Zealand and its predecessor, and had been in the position from which she was dismissed for some 9 years.

During 1998 the employees at the office where Ms Hill worked were all male, except for Ms Hill and the receptionist. Ms Hill disliked the language used by the men in the office, which she described as 'extremely derogatory of women and offensive'. In July 1998, after one of them sent an email message containing material which Ms Hill described as pornographic, Ms Hill

complained formally to Lorraine Tomlinson about the message and about her colleagues' response to her concerns. Ms Hill said she also advised Ms Tomlinson that another Area Manager ("A") was having an affair with a member of the staff at the office he managed ("Z"), as well as having had an affair with another member of the Housing New Zealand staff. Finally Ms Hill said she suggested that Housing New Zealand look into providing training about sexual harassment, and provided the name of a person able to offer such training.

Ms Hill's view of the outcome of that process was that 'nothing happened'. There was no training on acceptable workplace behaviour, nor was there training about sexual harassment. She believed nothing was done about A because she continued to receive information about his inappropriate behaviour at work, and she remained dissatisfied with D's response to her concerns about the behaviour at her own office.

In or about July 2000 Ms Hill learned that A was to be given an additional and significant area of responsibility. For reasons connected with her view of A's behaviour, she was 'outraged' when she heard about this. She felt she should do something so decided to write a letter to the newly-appointed Chief Executive Officer of Housing New Zealand, Michael Lennon, who was based in Wellington. Her account of the purpose of the letter was that she wanted something done about A's behaviour, and that since she was writing the letter anyway she decided to include other complaints she had received in discussion with other staff members. She wanted to provoke some action on what she believed to be serious concerns at management level.

She wrote the letter on 20 July 2000, and it was posted on 28 July 2000. It was unsigned. Ms Hill did not put her name to it. It began by questioning the additional responsibility given to A and commenting on his sexual and general behaviour, as well as naming the two women with whom he was said to have had (or was still having) an affair. It also made a generalised allegation of favouritism on his part. It went on to mention the name of another Area Manager ("B"), saying that person "treats staff very badly and plays favourites and has no decent managerial skills." Then it said:

"Most of them [the Area Managers] are second rate and make no attempt to encourage any one else in case there is competition for their jobs. Some staff have left and sent the information about managers directly to HR in Wellington but still nothing is done. Who can staff trust if the Regional Manager won't do anything and isn't interested you are a new broom please help us (sic)."

When Mr Lennon received the letter he contacted Housing New Zealand's Manager of Human Resources Operations, Bemy Pokoati, and they discussed how best to begin investigating the matter. Housing New Zealand had a staff feedback system which included climate surveys and leadership surveys. Those surveys were reduced to writing, and offered staff the opportunity to give their views to management on various workplace issues, including their views on their own managers and more senior managers if they wished. In addition exit interviews were conducted with staff who were leaving, and the reference in the anonymous letter to the provision of information to 'HR in Wellington' was taken as a reference to the exit interviews. Ms Hill subsequently confirmed this understanding was correct.

Accordingly Ms Pokoati, and in turn Ms Tomlinson, reviewed the climate and leadership surveys to see whether they revealed any information that would tend to support the allegations in the letter, or shed further light on them. They found no such information. At Mr Lennon's request, Ms Pokoati questioned the member of her human resources staff who had responsibility for the relevant region, but he had no further information. Finally Ms Pokoati was asked to investigate salary information to see if anything in that information supported the allegations of favouritism. She concluded it did not.

The letter was passed to Ms Tomlinson in or about the first week in August 2000. She also reviewed salary and climate surveys which were available to her. She found there was no mention of any issues of the kind referred to in the anonymous letter, and that A had a high rating overall – although she noted that B received a lower rating than the other managers overall. Even so, the key area for improvement identified for both of those managers was staff coaching and development.

As no assistance had been gained from studying the documentary information available, more information would be needed to progress the investigation and that information would have to come from individuals. Ms Tomlinson decided to meet with Ms Hill to discuss the letter. She said Ms Hill was the person she spoke to because the letter made reference to a complaint being received by a female PSA person and she knew Ms Hill to be a PSA member. Indeed Ms Hill was the PSA delegate for her office.

The meeting between Ms Hill and Ms Tomlinson was held on 5 September 2000. A third person was present and took a note of the meeting. Ms Tomlinson explained at the investigation meeting that her delay in approaching Ms Hill was because during August 2000 her time had been taken with two serious fraud investigations which were running concurrently.

Ms Tomlinson did not show Ms Hill the letter, but described its contents. She told Ms Hill that she was speaking to her because of the reference to a female PSA person, and asked if Ms Hill knew anything about the letter. By the end of the discussion Ms Hill had realised the letter she was being asked about was the one she had written, but she denied any knowledge of the letter. However she did take the opportunity to repeat generalised allegations about A's inappropriate sexual behaviour, as well as the allegations about his affairs. She also named a person who was alleging A had 'hit on' her.

The meeting ended with Ms Tomlinson saying to Ms Hill that the employer's ability to pursue the matters raised in the letter depended on its ability to substantiate the claims made. Ms Hill acknowledged that by replying that she realised Housing New Zealand could only 'go so far' but said she meant it could only 'go so far' if it had a series of allegations but was unaware of who had made them. It seems she envisaged that an investigation could proceed notwithstanding, while Ms Tomlinson's view was in effect that the employer already could go no further without identifying the author of the letter and finding a basis on which to proceed.

The next day Ms Hill provided Ms Tomlinson with a list of PSA delegates, which Ms Tomlinson recalled were mostly female. Ms Hill said at the investigation meeting she believed the information might assist Ms Tomlinson, although she did not say how. Nevertheless it seems she believed at least one delegate had some relevant information, although she said at the investigation meeting that the delegate concerned did not want his or her name used. This was an unsatisfactory stance for people who expected their complaints to be investigated since Ms Tomlinson needed to be able to identify people directly affected by the alleged actions of the various managers, rather than people who were able to tell her there was gossip about those actions and do no more than pass on the gossip.

Ms Tomlinson then turned to investigate who had written the anonymous letter. It was obviously written on a word processing system, and a code at the bottom of the letter indicated it was generated within Housing New Zealand. Ms Tomlinson asked the organisation's computer network centre to attempt to ascertain which user had printed the letter. The resulting report was not made available to her until about 1 November 2000, because the network centre was working on the major alterations required by the introduction of a new government policy. The report concluded that the letter was printed under Ms Hill's user identification on 20 July 2000 at 9.14 am.

In addition the letter was sent in an envelope on which there was some handwriting. Ms Tomlinson was already in contact with an organisation specialising in corporate investigations because of the concurrent fraud investigations, so she passed the envelope and supporting material to it for a report by a handwriting expert. The report was provided to Ms Tomlinson under cover of a letter dated 29 September 2000, and in effect expressed the opinion that Ms Hill's writing was on the envelope.

As for further investigation into the content of the letter, some time in October Ms Tomlinson interviewed the parties to the alleged affair. Even aside from any suggestion of sexual harassment, Housing New Zealand had a policy that the parties to a close relationship should not be employed in a direct reporting relationship so the matter was still one of concern. The two were interviewed separately, and both denied having an affair. In addition Ms Tomlinson told A there were rumours about his behaviour and his behaviour had been referred to in an anonymous letter. A said he was unaware of the rumours and made a flippant remark about the allegations concerning his affairs.

By November 2000 Ms Hill had concluded that she was being treated unfairly in respect of her salary increases, in particular the increase she was given following a review in August 2000. Her lawyer, Ms Fitzgibbon, formally submitted a personal grievance on her behalf in respect of the matter by letter dated 15 November 2000.

By letter dated 16 November Ms Tomlinson wrote to Ms Hill asking her to attend a meeting as a follow-up to the meeting of 5 September. Not unexpectedly in the light of the silence from the employer to that point regarding the anonymous letter, Ms Hill took the view that Ms Tomlinson's letter to her was prompted by the submission of her personal grievance. Ms Tomlinson denied being aware when she sought that meeting of the personal grievance letter dated the previous day, and I note that the letter was addressed to Mr Lennon in Wellington. Given the timing of the letters it is eminently possible that this was the case. Further, Ms Tomlinson explained what she was doing about the anonymous letter between 5 September and 16 November, and although the delay remains unsatisfactory I do not believe that the submission of the personal grievance caused Ms Tomlinson to retaliate by reviving the matter of the anonymous letter.

There were extensive delays before the follow-up meeting could be arranged, which were contributed to by Ms Fitzgibbon's moving office, the intervention of the Christmas and New Year holiday and the unavailability of Housing New Zealand's lawyer Mr Quigg. Eventually a meeting was held on 15 March 2001.

In a letter dated 18 December 2000 Ms Fitzgibbon repeated Ms Hill's denial of knowledge of the letter, and asked for an agenda for the proposed meeting. The response to that request took the form of the following statements contained in a fax from Mr Quigg dated 8 March 2001:

"Our client wishes to speak with your client further about an anonymous letter sent to the Chief Executive Officer. Our client has asked that we be present at that meeting. At the commencement of the meeting we will make a copy of the letter available to you on the basis that it is treated in the strictest confidence and returned to us that morning without copying. ...

The purpose of the meeting is that our client is not satisfied with the absolute denials made by your client and accordingly wishes to explore the matter further with her ..."

Ms Hill and Ms Fitzgibbon, Ms Tomlinson and Mr Quigg attended the 15 March meeting. The anonymous letter was handed to Ms Fitzgibbon at the start of the meeting. However Ms Hill wished to make a statement before matters proceeded any further. She did so, summarising the prelude to and the meeting of 5 September. She included confirmation that she had told Ms Tomlinson she did not write the letter. In the ensuing discussion about the 5 September meeting it seems there was significant common ground over what had been said there. Ms Hill and Ms Fitzgibbon then read the letter and sought an adjournment.

After the adjournment Ms Hill again denied writing the letter. Mr Quigg showed Ms Fitzgibbon the envelope in which the letter had been sent, and Ms Hill denied being the originator of the handwriting on it. Mr Quigg also advised that Ms Tomlinson had interviewed both A and Z, but they had both denied the allegations about them. Mr Quigg then made available copies of the report of the handwriting expert, and supporting material. Ms Hill and Ms Fitzgibbon took a further adjournment.

On their return Ms Fitzgibbon asked if there was any further evidence indicating Ms Hill wrote the letter, but again denied that Ms Hill had done so. Mr Quigg made available a copy of the report from the network centre and summarised its contents. Ms Hill and Ms Fitzgibbon took another adjournment.

On the resumption this time Ms Fitzgibbon indicated that she might need to speak to a computer specialist about the meaning of the network centre report. She asked what the consequences would be to Ms Hill if she had written the letter. Mr Quigg was not prepared to speculate, but indicated that if Ms Hill had written the letter then that might raise issues of trust and confidence (Ms Hill's recollection) or issues as to the contents of the letter and as to misleading one's employer (Mr Quigg's version as recorded). Ms Hill again denied writing the letter.

There was another adjournment to allow Ms Tomlinson to consider Ms Hill's responses. Ms Tomlinson still had doubts about whether Ms Hill had written the letter, so at the end of the adjournment Mr Quigg advised that Ms Hill would be suspended on full pay 'for the shortest possible period'. This would allow Ms Hill and Ms Fitzgibbon to consider further the material they had received and to obtain any expert advice they wished before responding further. Housing New Zealand could also reflect further. When both parties had completed this process the suspension could be reviewed at a further meeting.

Ms Fitzgibbon challenged the lawfulness of the suspension, and later did so more formally by submitting in writing a personal grievance on behalf of Ms Hill in respect of it.

After the meeting Ms Hill admitted to Ms Fitzgibbon that she had written the letter. Ms Fitzgibbon advised Mr Quigg of the admission by telephone, and by a letter of the same date set out Ms Hill's reasons both for writing the letter and for denying authorship. These were that Ms Hill wrote the letter because she was frustrated over the lack of investigation into A's sexual behaviour. She wrote to the CEO because the matter had been raised before but nothing had been done. She denied authorship because she feared losing her job, and she feared her actions would jeopardise the position of her partner.

A further meeting was held on 21 March 2001. The purpose of the meeting was set out in a letter from Mr Quigg dated 16 March 2001. The letter advised that Housing New Zealand wished to address with Ms Hill the consequences of her repeated denials of authorship of the letter, as well as the contents of the letter. It went on to say: "For the avoidance of doubt, if there could be any, this is a situation where your client's future employment is at risk and in that regard, as previously, your client is invited to have your Anna Fitzgibbon or any other representative present at this meeting."

In addition to the four people who had been present at the 15 March meeting, Ms Pokoati attended the 21 March meeting because Ms Fitzgibbon had challenged Ms Tomlinson's impartiality given that she was one of the managers criticised in the letter. Ms Pokoati had authority to take an overriding decision-making role if necessary. Mr Quigg outlined the purpose of the meeting by saying that it was to seek explanations of the denials of authorship as well as explanation and comment regarding the content of the anonymous letter. Housing New Zealand would consider

any explanations and other material before considering what action would be taken about the matter.

Ms Hill stated that her reasons for denying authorship were that she felt unsafe because Ms Tomlinson, one of the people criticised, was running the relevant meeting. She was also concerned about the possible adverse effects of her action on her partner, and because she had not told her partner what she had done.

As a result of the parties' discussions about the matters Ms Hill raised in the letter, as well as the investigations Ms Pokoati and Ms Tomlinson carried out themselves, the material available at the meeting of 21 March includes the following:

(a) A's alleged sexual misbehaviour. Ms Hill's information was based very substantially on rumour and, with the named exception, on information passed to her by people who were not themselves involved in any identified incident with A. Ms Tomlinson believed she had investigated the exception I have referred to, and ascertained that no complaint was made. The lack of a complaint was verified at the investigation meeting by affidavit filed by the individual concerned, who also said that she had been asked whether she wished any action to be taken but she declined because "I felt that I had dealt with it in my own way, nothing further had happened and so I felt that that would be the end of it." In addition I was given details of the behaviour in question, and consider it very unlikely that (even if it occurred) it fell within any statutory definition of sexual harassment.

Ms Hill was not herself the subject of any inappropriate approach or other inappropriate treatment by A. She did not work in his office. However she maintained that he was still involved in an affair with Z, and said the fact of the affair's continuing indicated to her that nothing had been done about it. She made no mention of A or Z ever having said anything to her about a relationship between them, or of observing their conduct herself.

(b) The allegation in the letter that Ms Tomlinson had been told by a PSA person in or about 1998 of an allegation that a person had walked in on A and Z in a compromising position, but had taken no action in respect of the alleged incident. That allegation appears to be connected with Ms Hill's allegation that she raised concerns about A with Ms Tomlinson in 1998. I return to the latter shortly.

Ms Tomlinson had no recollection of the matter of A's behaviour being raised with her in 1998. There was no other evidence at all concerning the allegation about A and Z being caught in 'a compromising position', although Ms Hill expanded on the incident on 5 September by saying Z was seen 'in a state of disarray'. The person concerned had told this to Ms Hill, but Ms Hill did not know the person's name. Ms Hill herself was 'the PSA person' referred to in the anonymous letter.

(c) Allegations that A reacted to complaints by withholding pay rises. Ms Hill's information came from generalised complaints and hearsay information passed to her, and she did not mention the names of anyone allegedly disadvantaged in that way. Housing New Zealand's investigation of salary material had not supported the allegations.

(d) Allegations of favouritism by A and B, and the allegation that B had 'no decent managerial skills'. Ms Hill's information came from generalised complaints passed to her, and she did not work in either of the relevant offices herself. Again she provided no further concrete information.

- (e) Allegations about failure to act on the part of HR staff in Wellington. Ms Hill believed that departing staff wrote to HR in Wellington about these matters, but as nothing changed she assumed there was no investigation. She provided no further details.
- (f) General allegations of failure to act on complaints on Ms Tomlinson's part. Ms Hill said at the 21 March meeting that she was again relying on what she had been told. Otherwise these allegations appear to relate to Ms Tomlinson's alleged failure to act on the concerns raised in 1998, and possibly to her apparent inaction following information passed to her by Ms Hill's partner.

I now turn to those matters, some of which were raised in correspondence between Ms Fitzgibbon and Mr Quigg, as well as being discussed at the 21 March meeting. The first concerns the complaint which Ms Hill had forwarded to and discussed with Ms Tomlinson in July 1998, and arising from her receipt of an email she found offensive. Ms Hill believed the sender of the emails should not have remained in the office, and I infer that her observation that he remained there - or at least that no action appeared to have been taken against him - was one of the matters to which she was referring when complaining about Ms Tomlinson's failure to act.

There was a meeting between Ms Tomlinson and Ms Hill about the complaint on 8 July 1998. Ms Tomlinson confirmed in writing her view of the outcome of the meeting, and I quote some extracts from her letter because of their bearing on Ms Hill's later allegation that she felt unsafe with Ms Tomlinson when discussing the anonymous letter, as well as the allegation about Ms Tomlinson's failure to act. The letter said: "I would like you to know that I take this situation seriously and I encourage and appreciate the way in which you so openly and willingly discussed these matters at our meeting." It went on to set out some of the agreed action points, before ending with: "Finally you indicated at this stage you did not require any other assistance from me. In closing I would like to say that I appreciate the open and frank discussion we had and believed that the outcomes agreed upon go some way towards improving the working environment." I record that action was taken in respect of the sending of the email, and an email policy was developed.

The meeting of 8 July 1998 was also the one at which Ms Hill, in the affidavit she prepared for these proceedings, said she informed Ms Tomlinson of the allegations about A and his affairs. She said she expressed her concern to Ms Tomlinson about those matters. If that was the case then I would expect mention of them to have been made in the correspondence and documentation associated with that meeting and the circumstances leading up to it. There was no such mention at all. Even the record of the 15 March meeting shows Ms Hill saying she believed her partner was the one who raised the concerns with Ms Tomlinson, although a record of the 21 March meeting shows Ms Hill stating she raised them in 1998. Overall that information, together with Ms Tomlinson's lack of recollection of any such discussion with Ms Hill, leads me to conclude it is more likely than not that Ms Hill did not raise the matters in 1998.

Nevertheless there was discussion at the investigation meeting about the degree to which Ms Hill's partner had raised with Ms Tomlinson concerns about A's behaviour. Ms Tomlinson recalled having a conversation to that effect about a month before she received the anonymous letter, but did not recall having such conversations before that. At the investigation Ms Hill's partner recalled mentioning the matter to Ms Tomlinson on at least two occasions in 1998 - 1999. I have no reason to disbelieve this evidence, and I accept it. I note, however, that there was no formal complaint made about A, rather Ms Hill's partner brought the allegations about A's affairs to Ms Tomlinson's attention during the course of what appeared to be informal discussions with Ms Tomlinson.

Returning to the meeting of 21 March 2001, after the discussion about the denial and the contents of the letter, Ms Fitzgibbon and Ms Hill were given an opportunity to make submissions about an appropriate outcome or penalty. Mr Quigg stated that Ms Pokoati would be making the final

decision herself. In response, Ms Fitzgibbon said Ms Hill would undertake to write no more anonymous letters and Ms Hill noted there would be no further need to do so because Housing New Zealand had implemented whistleblowing procedures. Ms Fitzgibbon also pointed to Ms Hill's length of employment and high standard of performance, and submitted there was no need for any continued suspension, warning or dismissal.

Ms Pokoati then went into a separate room, where she sat alone to consider what should be done. She had taken notes of the questions and responses exchanged during the meeting, and perused those as well as the notes of previous meetings. She also had available to her a copy of Ms Hill's contract of employment and had seen the relevant internal surveys, as well as the reports of the handwriting and computer specialists. The anonymous letter was also in front of her, and she was aware that neither she nor her own staff member had heard information of the type Ms Hill was putting forward. In addition Ms Tomlinson had reported the outcome of the interviews with A and Z to her. Ms Pokoati weighed Ms Hill's actions and explanations before coming to a conclusion as to what would be reasonable.

After she had reached her conclusion, Ms Pokoati returned to the meeting room and announced it.

Ms Pokoati concluded that summary dismissal was appropriate, and gave the reasons for her decision in the following terms:

“the content of the letter written by Stephanie Hill dated 20 July 2000, especially the wide-range of criticisms and the explanations given about them, and in particular the denials as to the authorship over the 6 month period are such that Housing New Zealand considers its trust and confidence in Stephanie Hill has been destroyed.”

### **Determination regarding suspension**

The principal challenge to the justification for the suspension was that Housing New Zealand did not follow its own disciplinary and dismissal procedure in imposing the suspension. In particular clause 6.1 requires that, when incidents of unacceptable behaviour are identified, a meeting may be arranged. The purpose of the meeting is to seek an explanation of the behaviour, and the employee must be advised of the possible consequences of the meeting – be it dismissal or a formal warning – prior to the meeting occurring. There was no warning of the possibility of suspension prior to the meeting of 15 March 2001. Depending on the particular circumstances, the authorities on the justification for a suspension also indicate in general that, as a matter of fairness, an employee should be warned of the possibility of suspension before a suspension is imposed (for example: **ASTE v Northland Polytechnic Council** [1992] 2 ERNZ 943; **Tawhiwhirangi v Attorney General in respect of Chief Executive, Department of Justice** [1993] 2 ERNZ 546).

Even if I accept that, before the meeting started, Housing New Zealand was still investigating the background to the letter and did not necessarily envisage disciplinary action as a possible outcome, the fact remains that, during the course of the meeting, it made a decision to suspend Ms Hill. The suspension was imposed out of the blue from Ms Hill's point of view. She received no prior warning - either before or during the meeting - of the possibility of suspension. Again, even if I accept that the suspension was intended to provide Ms Hill with an opportunity to consider fully her position on the authorship of the letter rather than being intended to be disciplinary in nature, its effect was that the employer unilaterally withdrew Ms Hill's usual duties from her.

If the need for time for consideration or to seek further assistance was the issue, it could have been discussed and suitable arrangements made by agreement, rather than by the imposition of a suspension. If it proved not to be possible to reach an agreement, then the available options could have been put to Ms Hill at that time. Further, in the light of the delay in dealing with the

anonymous letter, Housing New Zealand could not (and did not) rely in support of the suspension on any argument based on urgency.

Accordingly I conclude that the suspension was an unjustifiable action on the part of Housing New Zealand. Ms Hill has a personal grievance in that respect.

The application for reinstatement which was associated with this grievance has been superseded by a similar application associated with Ms Hill's dismissal, and will be dealt with in that section of this determination. I note that Ms Hill remained on pay, so that there was no loss of remuneration, and the remaining remedy sought was compensation for Ms Hill's humiliation, loss of dignity and injury to feelings.

It is plain that being seen to report for work, as well as the job itself, was important to Ms Hill. I accept that there was injury to her feelings when she was, in effect, told not to report to work. However as her dismissal followed relatively shortly afterwards the effect of any injury caused by the suspension was short-lived, and I make a modest award in respect of it. I also take into account that Ms Hill was still denying her authorship of the letter, and thereby contributed significantly to the circumstances that led to the decision to suspend. I therefore order Housing New Zealand to pay to Ms Hill the sum of \$1,000 as compensation for her unjustified suspension, under s 123(c)(i) of the Employment Relations Act 2000.

### **Determination regarding dismissal**

This is not a case in which an employee was dismissed solely on the ground that she wrote an anonymous letter. Ms Hill was dismissed because the content of the letter and her denials of authorship meant that Housing New Zealand concluded it had lost the faith and trust in her it needed in order to maintain the employment relationship. Moreover, it concluded the loss was serious enough to justify summary dismissal.

There was some discussion at the investigation meeting about the fact that Housing New Zealand now has a procedure for making protected disclosures of information about serious wrongdoing, following the coming into force of the Whistleblowers Act 2000. In addition the coming into existence at a similar time of a procedure for the anonymous provision by email of 'free and frank views and opinions' during a restructuring of Housing New Zealand was pointed to. These facts are of limited assistance, however, because Ms Hill was not dismissed on the ground of the mere fact that she wrote a letter of complaint anonymously, rather I repeat that it was the content of her letter and the denial of authorship which led to the dismissal.

To the extent that Ms Hill says that, had such procedures been available at the time when she wrote her letter she might have felt 'safer', then I do not consider that assertion to be reliable. For example the procedure for making protected disclosures has a clearly underlying assumption that the employee making the disclosure will identify him or herself. The procedure does not address anonymous disclosures, and although it allows the person to whom a disclosure is made to prevent the release of information identifying the informant, this can in turn be overridden in the interests of ensuring the effective investigation of allegations or to comply with the principles of natural justice. Ms Hill was so overwhelmingly reluctant to identify herself as a complainant that I find it difficult to see how such a procedure would make her feel safe.

There are three Court of Appeal judgments which set out the principles to be followed in respect of this grievance, and I have borne all of them in mind:

- (a) **BP Oil Limited v Northern Distribution Union** [1989] 3 NZILR 276 - the test of justification for dismissal for misconduct is one of what was open to a reasonable and fair employer. The matter is one of fact and degree;
- (b) **BP Oil Limited v Northern Distribution Union** [1992] 3 ERNZ 483 - where an employer's action is within the range of actions reasonably available to it, it is not for the Authority to substitute its opinion for that of the employer;
- (c) **Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited** [1990] 3 NZILR 584 - an employer must prove that, as a result of a complete and fairly conducted enquiry, it was justified in believing and did believe that serious misconduct had occurred; at the time of dismissal an employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left it, on the balance of probabilities with grounds for believing, and it did believe, the employee was at fault.

It was self-evident that Ms Hill lied to her employer several times, either directly or through the instructions she gave Ms Fitzgibbon, about her authorship of the letter. It was equally evident that Housing New Zealand found her reasons for doing so unacceptable.

In general the reasons Ms Hill gave for lying about the letter amounted to reasons why anyone who had written anonymously might feel reluctant to disclose his or her identity at the time of writing. They simply amounted to inchoate fears of what might happen to the author if the author were identified. I regard Ms Hill's fears about the effect on her partner as falling within this category also. While such fears - even if without real foundation - might be acceptable as reasons for the decision to write anonymously, they are not necessarily acceptable as reasons for later lying about the fact of authorship.

In developing her explanation to Housing New Zealand Ms Hill came to place particular reliance on the fact that Ms Tomlinson – a person she had criticised in the letter – was also the person asking her if she knew anything about the letter. Housing New Zealand did not accept this stance, and I am highly sceptical about whether it was the operative reason for Ms Hill's denial of knowledge of the letter at the meeting of 5 September 2000. Ms Hill's evidence overall was redolent of statements to the effect that people who were passing information to her did not want their names used, her concern about the effect on her partner of finding out about her authorship at all, and generalised fears about the outcome if an informant's name was used. I believe those fears were motivating factors in the denials. I was not convinced by her statements that she did not 'feel safe' about disclosing her authorship to Ms Tomlinson and I do not believe she would have felt 'safe' enough to admit her authorship to anyone.

In any event Ms Tomlinson did not strike me as an aggressive, unapproachable or threatening person, and the letter she wrote in 1998 as quoted earlier in this determination appeared to me to be illustrative of the way in which she conducted discussions with Ms Hill. Even the minutes of the 5 September meeting indicate that she thanked Ms Hill for being open, and that Ms Tomlinson neither made threats nor accused Ms Hill of anything. In addition Ms Hill's partner and Ms Tomlinson agreed they had a cordial working relationship, which again tended to suggest Ms Hill had no reason to fear acknowledging her authorship to Ms Tomlinson. If Ms Hill had such a fear, it was not sufficiently well-founded to amount to a good enough reason for lying.

I also take into account - as did Housing New Zealand - that it was made clear to Ms Hill that she was not being asked about the letter merely so Housing New Zealand could find out who wrote it. She was told that there was a limit on how far Housing New Zealand could investigate the matters raised in the letter, if it was unable to identify who wrote it and gain more substantial information with which to proceed. It was unrealistic for Ms Hill to ignore this information and expect Housing New Zealand to conduct the necessary investigation without further details from her. I have noted

that, on 5 September, Ms Hill proceeded to give Ms Tomlinson a limited amount of further information, but without knowing Ms Hill was the author of the letter Ms Tomlinson was in no position to treat that information as any more than gossip. She could not know that such information was the kind of information that influenced the author of the letter and that the author wanted her to follow it up.

I therefore conclude that Housing New Zealand was entitled to take the dim view it did of Ms Hill's denials of authorship of the letter.

As for the content of the letter, as Housing New Zealand correctly pointed out both at the investigation meeting and to Ms Hill, a number of very serious allegations were made. The allegations called for further investigation, and Mr Lennon and Ms Pokoati in particular recognised that. After initial attempts were made to conduct such an investigation, no firm information emerged in support of the allegations. Nevertheless, the allegations were serious enough to warrant further pursuit.

Ms Fitzgibbon challenged Ms Tomlinson's involvement in investigating matters associated with the letter on the ground that such involvement gave the appearance of bias on Ms Tomlinson's part.

I have taken into account the following statement of the applicable law:

"Bias in this context includes situations where it appears persons charged with the responsibility of making decisions have so conducted themselves to lead an objective observer to conclude that they have closed their minds and were no longer giving genuine consideration to the issues before them. It relates not merely to the existence of some pecuniary or other interest in the subject-matter of the litigation but also to any predetermination of the issue sufficient to show a real probability that the issue will not be determined in an unbiased or impartial manner. The existence of bias or predetermination may cause a dismissal to be unjustified.

... The classic statement of bias ... also points out that it is not necessary to show that there is any actual conscious bias and that the decision, although perfectly honest, may yet be 'invalidated by circumstances sufficient to show an antecedent probability of partiality'". (**Richardson v Board of Governors of Wesley College** [1999] 2 ERNZ 199, 220 ll 34 et seq).

A difficulty with the argument as to bias in the context of the above is that Ms Tomlinson did not make the decision to dismiss. Ms Pokoati made the decision, and in addition she was authorised to do so. She had received information from Ms Tomlinson, but was also present when this information was discussed and when Ms Hill gave her comments and explanations in respect of it. When Ms Pokoati retired to consider her decision, Ms Tomlinson was not present and I am satisfied that Ms Pokoati's decision was independently reached.

At the same time Ms Tomlinson's involvement up to and including the meeting of 15 March 2001 raises the broader question of whether the investigation was unfair to Ms Hill. If Ms Hill had admitted her authorship at the outset it may have been appropriate for a suitable person other than Ms Tomlinson to investigate the allegations contained in it. That did not happen, and Ms Hill's continued denials of any knowledge of the letter seriously weaken any associated suggestion that Ms Tomlinson should not have conducted the investigation into who wrote it.

Regarding Ms Tomlinson's role in the investigation into the contents of the letter, there were sweeping allegations potentially including all of the Area Managers as well as the Regional Manager. Ms Pokoati's preliminary investigation did not indicate anything of substance in the allegations, and she passed the matter to Ms Tomlinson. While it is true that Ms Tomlinson was mentioned in the letter, the allegation associated with her name was that 'someone here' had complained to a 'PSA person' who in turn said that Ms Tomlinson had been told about the relevant incident but nothing had been done. The other reference to Ms Tomlinson queried whom staff

could trust if the Regional Manager would not 'do anything'. These allegations were too vague to expect Ms Tomlinson to disqualify herself immediately.

With hindsight it might have been preferable for someone outside the immediate management structure for the region to conduct an investigation into the allegations. However at the time, given the anonymous nature of the letter as well as its contents, Housing New Zealand did not know enough about what it was dealing with to make the decision to commit its resources to an investigation of the potential magnitude suggested by the letter. Ms Tomlinson made an attempt to find out exactly what the letter was referring to, but did not get very far in the face of Ms Hill's denials. In addition Ms Pokoati had made her own preliminary investigation and Ms Tomlinson briefed Ms Pokoati on the investigation, so that Ms Tomlinson had a degree of accountability in respect of the way she proceeded.

There is, however, one aspect of the investigation into the anonymous letter and its contents with which I remain concerned. Even bearing in mind the almost complete absence of detail in support of Ms Hill's allegations about A's behaviour, the nature of the allegations was such that they called for a more careful investigation than they received. In addition Ms Hill's partner, who held a relatively senior position, had drawn Ms Tomlinson's attention to allegations of a similar nature. Ms Tomlinson could at least have questioned, or commissioned someone to question, the staff at A's office about A's behaviour and about what, if anything, they had observed about his relationship with Z. That, in turn, might have assisted more careful questioning of A and Z.

The exercise could have yielded no more than the second or third hand information Ms Hill was able to provide, or it could have indicated a need for further action in respect of A in particular. If the latter were the case, then Ms Hill's actions could have been viewed in a different light.

Alternatively a more careful investigation, including further discussions with Ms Hill's partner on the basis that she had indicated some knowledge of the matter, might have indicated that the complaints against A had no substance while at the same time identifying the existence of widespread and pernicious gossip of the type presented at the investigation meeting. Ms Hill's partner, for example, produced a printout of a recent exchange of email messages, with the participants' names deleted, which proved nothing about A but indicated something about the nature of the conversations that might have led Ms Hill to make the allegations she did.

I conclude that, despite Ms Hill's inability to provide details of her allegations and her failure to admit to authorship of the anonymous letter, Housing New Zealand did not conduct as thorough an investigation as it could have into the contents. In terms of the tests set out in the **Airline Stewards and Hostesses** (supra) case, I do not believe that Housing New Zealand had conducted a sufficiently complete investigation into A's behaviour before reaching the conclusion that summary dismissal was appropriate.

On that limited ground I find Ms Hill's dismissal was unjustified. She has a personal grievance.

## **Remedies**

Ms Hill has sought reinstatement. In such circumstances section 125 of the Employment Relations Act obliges the Authority to provide for reinstatement wherever practicable.

The wording of s 125 is substantially similar to the wording of s 228 of the Labour Relations Act 1987, which also provided for reinstatement. It is therefore appropriate to apply the law on the point as it developed under the Labour Relations Act. A useful starting point can be found in the following extract from **Labour Law in New Zealand**, John Hughes, 1990:

“...In the Court’s view, “practicable” means simply “capable of being put into effect”, or “able to work” ...

It is clear that the simple opposition of the employer to reinstatement cannot, in itself, bear much weight on the question of practicability. It is to be expected that having dismissed the worker, and declined the statement of grievance, the employer will not wish to have the employee back. To allow this view to prevail, without more, would negate the role of reinstatement as the primary remedy. Thus an employer’s opposition, whilst carrying some weight, is no reason for denying reinstatement even where the worker’s behaviour may have been unacceptable in some respects. ...” (p 2452)

“Where there has been misconduct, and particularly in the context of a final warning, the Court has made it clear that the misconduct remains relevant when ordering reinstatement. The nature of the misconduct will clearly be relevant.” (p 2453)

Here, Housing New Zealand was strongly opposed to reinstatement.

With reference to the reasons why it says it has lost trust and confidence in Ms Hill as an employee, Ms Hill’s misconduct took the form of expressing extremely disparaging views about a group of managers at Housing New Zealand. While a restructuring has meant that Ms Tomlinson is no longer employed there, the other managers still remain. Of those, one is Ms Hill’s partner and in the light of Housing New Zealand policy it is not appropriate to reinstate Ms Hill into that manager’s office. Of the remainder, one is D, with whom Ms Hill was dissatisfied, and two others are A and B of whom Ms Hill said “we don’t need people like [them] ...” in addition to the more serious allegations she made against A. Of the area managers in general Ms Hill said “Most of them are second rate and make no attempt to encourage anyone else in case there is competition for their jobs.” She finished the letter by threatening to go ‘to the papers’ if nothing was done about the managers. Attitudes such as these are not consistent with the employee’s duty of loyalty to the employer.

Not only that, although I have found Ms Hill’s dismissal to be unjustified I consider that she was guilty of a substantial degree of contributory fault. In addition, while I have found that the investigation into the contents of her letter was not sufficient at the time, her allegations were serious and based on the flimsiest of information. That matter has sounded in my assessment of remedies.

For those reasons, reinstatement is declined.

Ms Hill also seeks compensation for the injury to her feelings occasioned by the dismissal. I accept that her job means a great deal to her, and is a source of pride for her. However while she may have applied herself diligently and successfully to the performance of her duties, unfortunately she appears to have been similarly diligent in collecting destructive gossip about area managers and in leaping to unwarranted conclusions. She was not prepared to pass on information she received in a way that would enable it to be dealt with and investigated properly, and reached adverse conclusions about the managers based on little information of substance. Then when she passed her allegations on to Mr Lennon, she was not prepared to admit to having done so.

As I have mentioned, I therefore conclude that she contributed to the circumstances of her dismissal so that a reduction in the amount she would otherwise have been awarded is appropriate.

Having said that, I bear in mind also that the parties have had an interim arrangement in place pending the Authority’s determination of this matter. In the light of the detail of that arrangement, as well as the findings in this determination, I further reserve my determination of any monetary orders in respect of the unjustified dismissal.

The parties may reach agreement in settlement of the matter, or they may make further submissions on it. In either case the Authority is to be advised of the outcome. If the parties wish to make further submissions on remedies then they should also agree on a timetable for filing and serving such submissions and advise the Authority promptly. Should any further directions be needed, either party may approach the Authority regarding these.

### **Costs**

Costs are also reserved. If the parties wish, they may address me on costs in association with any submissions they wish to make regarding remedies. Similarly if they are able to settle the matter themselves they are invited to do so, but the Authority should be advised of the existence of any settlement.

**R A Monaghan**  
**Member, Employment Relations Authority**