

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 65  
5367678

BETWEEN

LYNDA HILL  
Applicant

AND

WORKFORCE  
DEVELOPMENT LIMITED  
Respondent

Member of Authority: P R Stapp

Representatives: Patrick O'Sullivan, Advocate for Applicant  
David McLeod, Advocate for Respondent

Investigation Meeting: 10 April 2013 at Wellington

Date of Determination: 31 May 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This employment relationship problem involves a triangular arrangement between Ms Hill, Workforce Development Limited (WFD) and the Department of Corrections (the Department/Corrections).

[2] Ms Hill was employed by WFD as a tutor to teach literacy and numeracy. She was required to work at one of the Department of Correction's Prison facilities. She was given access by the Department to the facility to undertake her duties.

[3] During an overseas trip Ms Hill sent a postcard depicting the British Houses of Parliament, to one of her students at the Prison, to assist that person in the learning process. The postcard was discovered and intercepted by officials at the Department of Corrections. For security reasons Ms Hill was subsequently suspended from the facility. Ms Hill and a representative from WFD met with an official from the

Department. Subsequently she was advised that a decision had been made and she was not allowed back to the Prison.

[4] Ms Hill was then informed by Anne Greenhalgh, the National Foundation Learning Manager of WFD that because of the decision made by Corrections, Ms Hill's employment would be terminated. Ms Hill was given one month's notice and in the meantime redeployment options were pursued. Ms Hill is seeking lost wages, compensation for personal grievance and costs.

[5] WFD denies all the claims.

### **Issues**

[6] The issues are as follows:

- a. Is WFD bound by arrangements pertaining to the Corrections' decision to ban Ms Hill from the Prison?
- b. Was Ms Hill dismissed?
- c. What were the reasons for the dismissal?
- d. Was the reason justified?
- e. Was the action of the employer fair?

[7] There are a number of factual issues that will emerge and I will deal with these in due course. The facts in this matter are relatively straightforward and there is much common ground between the parties. In brief the facts are as follows.

[8] Ms Hill was employed as a part-time tutor on 6 December 2010 under the terms of an individual employment agreement. She was deployed to undertake duties of a tutor at the Whanganui Prison according to a contract between WFD and the Department of Corrections.

[9] Ms Hill's clearance to enter the prison seems to have been provided because she was allowed access to do her work. That access is determined solely by Corrections, and Corrections reserved the right to withdraw the right to access where it determined it appropriate to do so for safety, security or other concerns about a person given such access. This arrangement was provided for in the documentation.

[10] First, I refer to the relevant employment agreement. Ms Hill's employment agreement confirms that WFD was her employer, and her agreement with WDF came into effect on 6 December 2010. The agreement confirmed that her role was a "Foundation Tutor" in accordance with a job description provided as an attachment to the agreement. Her main place of work was at the Whanganui Corrections facility. She was paid \$28 per hour and required to work ordinary hours as required.

[11] The individual employment agreement also made the following provision under Policy and Procedures:

*... In addition to the rules and policies established by the Employer, the Employee shall comply with any rules and policies adopted by the Department of Corrections. This Employment Agreement is contingent on you being accepted by the Department of Corrections along with you successfully completing the Department of Corrections' **induction and orientation process**.*

*Should you fail to successfully make the transition through the full Department of Corrections induction and orientation process then this employment agreement will immediately terminate. The responsibility to complete the induction and orientation process, along with attendance at relevant courses and completion or required documents is exclusively yours.*

*It is further agreed that at any time, should the Department of Corrections consider you to be in **breach of any of their rules or policies**, and as a consequence deem this breach by you to be serious, they may withdraw your access to one or all of their sites.*

*In this instance, and should the Department of Corrections' decision become final, and there are no other positions for you to fulfil, Workforce Development Limited may terminate this employment agreement through the notice provisions.*

Emphasis added.

[12] The WFD and the Department of Corrections contract (the contract) for the supply of literacy and numeracy programme service was in writing. The contract made the following provisions:

2.2.5 *You accept that we may, at our discretion, withdraw access to a Prison or Prisons for any of your Staff Members, or require you to remove or replace any Staff Member in relation to the provision of the Services ("**the Affected Staff Member**") for any justifiable reason at any time during the term of this agreement.*

2.2.6 *If we decide to exercise our rights under **clause 2.2.5** of this agreement, the following process shall apply (to the exclusion of the dispute resolution procedure set out in **clause 5**):*

- 2.2.6.1 *We will advise you by the most expedient means that access to a Prison or Prisons has been withdrawn for the Affected Staff Member, and/or that we require you to immediately remove and replace the Affected Staff Member.*
- 2.2.6.2 *Within 5 Business Days of the date of the initial notification referred to in **clause 2.2.6.1**, we will advise you in writing of the circumstances that resulted in the Affected Staff Member having his or her access to the Prison or Prisons withdrawn and/or the requirement that the Affected Staff Member be removed or replaced.*
- 2.2.6.3 *Within 10 business days of the date of our written notification provided under **clause 2.2.6.2**, a meeting will be held between the Affected Staff Member, our selected representatives and your selected representatives, unless you and the Affected Staff Member waive this requirement. At this meeting:*
- 2.2.6.3.1 *We will explain our concerns about the circumstances that resulted in the Affected Staff Member having his or her access to the Prison or Prisons withdrawn and/or our requirement that the Affected Staff Member be removed and replaced; and*
- 2.2.6.3.2 *You, and the Affected Staff Member, will be afforded a reasonable opportunity to explain the reasons for the situation and put forward any other information that you and the Affected Staff Member may wish us to consider.*
- 2.2.6.4 *Subsequent to the meeting under **clause 2.2.6.3**, we will consider any explanation and information put forward by you and/or the Affected Staff Member and we will advise you in writing within 10 business days of the date of that meeting either that:*
- 2.2.6.4.1 *We consider the incident able to be resolved in view of the explanation and information provided and that access for the Affected Staff Member may resume and/or that the requirement that the Affected Staff Member be removed and replaced will be lifted, both or either of which may be subject to conditions imposed by us. We may also detail what you or the Affected Staff Member may need to do, to prevent a further incident in the future; or*
- 2.2.6.4.2 *We consider the incident to be serious and not able to be resolved despite any explanation or information provided*

*and that the withdrawal of access to a Prison or Prisons or the Affected Staff Member will be permanent and/or that we wish to enforce the requirement that you remove and replace the Affected Staff Member.*

[13] On 14 September 2011 Ms Hill was talked to by Mr Graeme Dack (who was the acting security manager from Corrections) about her postcard. She understood that he was sympathetic to her explanation and she thought that would be the end of the matter. On 15 September the matter was taken up further internally at Corrections.

[14] Ms Hill was copied into an email dated 15 September 2011 from Mr Dack that provided a synopsis of the preliminary interview that had been held on 14 September. The email reflected that the matter of the postcard had arisen. It conveyed that Ms Hill was genuinely apologetic and understood that she had crossed an ethical boundary. It also conveyed that Ms Hill admitted that the post card was the second postcard she had sent whilst employed/contracted by the Department and realised that it was wrong to do so. Mr Dack's finding was this had been an innocent mistake, Ms Hill had been honest and open about what happened and that there was little to substantiate any wrongdoing. Suggestions were made on a course of action that did not involve banning her from the site. Ms Hill could not recall receiving this email. Despite questioning her closely on this, she denied ever seeing the email until the document was disclosed for the Employment Relations Authority investigation.

[15] Ms Hill was suspended from the Prison facility on 21 September 2011 by the acting prison manager. The decision was confirmed in a letter of the same date (21 September) from the acting Prison Manager, Hati Kaiwai. Her letter indicated the need for an investigation into an allegation of inappropriate behaviour contrary to the Department of Corrections' policy relating to programme providers on the Whanganui site. WFD was informed. Thus Ms Greenhalgh refers to the letter later, when she writes to Ms Hill.

[16] On 29 September 2011 Corrections sent another letter to WFD that conveyed the following information:

*As you are aware the following information has been received with reference to the conduct of Lynda Hill, Facilitator employed by your*

*organisation to deliver foundation skills tuition at nominated Prison sites.*

*This information was received via sources within the Prison Service and has been evaluated and constituting a breach of the Department's Code of Conduct. Therefore we must take the necessary steps to safeguard ourselves and the interests of all parties within our arrangements, operations and agreements.*

*Summary of information – (sent via Velani Bernard)*

*As discussed, I have received a copy of a postcard addressed to prisoner [name withheld]. The postcard was intercepted at Hawke's Bay Prison by unit staff who passed it back to my staff, and then to me.*

*The postcard was sent by Lynda Hill who is a foundation skills tutor at Wanganui. [name withheld] was a past student of Lynda's at Wanganui. Lynda also makes reference to a postcard she sent [name withheld] last year from Mexico. The receipt of the first card has been confirmed by my staff.*

*I have serious concerns about the safety of this tutor and believe that she may be compromised. My concerns are as follows:*

- *We have a nothing in, nothing out policy. This includes letters and the tutors are well versed in this.*
- *Lynda first wrote to [name withheld] when he was at Wanganui Prison, he has since transferred to Hawke's Bay Prison and she has actively followed him [via correspondence only as far as I can ascertain]. This is clearly demonstrated by her sending the card directly to HB Prison.*
- *There is no way to know who else Lynda is corresponding with in the Prisons, the content or nature of information being passed, the volume of communications that has been passed between Lynda and [name withheld] and the method. Is she passing messages through her classes to prisoners?*
- *Lynda states in her postcard that if [name withheld] wants to correspond back to her, he may do so through "programmes". This puts my staff at risk by implying that this is acceptable when it could lead to our staff losing their job. It definitely compromises their safety.*
- *From what I understand, Lynda has worked at the Prison for quite a length of time – she was delivering programmes for another provider prior to her employment with Workforce. She is not new to our environment and should be aware of the dangerous situation she has put herself and our staff in. If she is not, then I am even more concerned for her safety.*

*Therefore, with reference to this current situation I would like to advise that access for Ms Lynda Hill to this Site and any other Corrections Site for the time being is suspended until further notice.*

*This is to allow for a thorough investigation into the situation outlined below and to provide assurance that she, your organisation*

*and the Department of Corrections are being protected in the appropriate manner.*

*An internal investigation has commenced and you will be notified once this has been completed.*

*In the meantime I would appreciate if you are able to follow this up with your facilitator and look forward to an outcome or response on this matter.*

*Can this be presented in writing addressed to the Prison Manager – Wanganui Prison at your earliest convenience please.*

*Hati Kaiwai  
Prison Manager*

[17] Ms Hill says that she never received this letter until a privacy request was made by her much later for her personal file from Corrections. Ms Greenhalgh agreed that she did not give the letter to Ms Hill, for whatever reason that has not been explained.

[18] Ms Greenhalgh wrote to Ms Hill on 29 September 2011 in the following terms:

***Your clearance with Department of Corrections***

*This letter is to formally advise you of a serious problem that has developed regarding your delivery of duties under our contract with Department of Corrections. On Thursday, 29th September 2011 I received the attached letter from Hati Kaiwai, Prison Manager<sup>1</sup>, confirming that your access to Wanganui Prison is withdrawn, effective 20th September 2011.*

*Along with this notice, I also attach the relevant section from my contract with Corrections, which sets out this entitlement and the process of dealing with this situation from here.*

*You will notice that you have the opportunity (unless you waive the right) to meet with Corrections, along with us, to hear directly from them and to make submissions to them on your own behalf. Once this meeting has occurred, Corrections will decide if they will or will not confirm the withdrawal of access requiring us to replace you.*

*The Individual Employment Agreement signed by you refers to this under the Policy and Procedures section, setting out:*

*It is further agreed that at any time, should the Department of Corrections consider you to be in breach of any of their rules or policies, and as a consequence deem this breach by you to be serious, they may withdraw your access to one or all of their sites. In this instance, and should the Department of Corrections' decision become final, and there are no other positions for you to fulfil, Workforce Development Limited may*

---

<sup>1</sup> The attached letter referred to is a letter that was sent by Ms Kaiwai, dated 21 September 2011.

*terminate this Employment Agreement through the notice provision.*

*As you will appreciate, this means that should the Corrections' decision become permanent, and should we be unable to redeploy you into some other work, then we may be forced to terminate your employment.*

*Given that you are now prevented from discharging your duties under your employment agreement, and if we are unable to identify something useful for you to undertake, we may need to invoke the suspension provision of your employment agreement. This sets out:*

*Where circumstances warrant it, the Employer has the discretion to temporarily suspend the Employee from their duties prior to a full investigation of the allegations surrounding the circumstances involving the employee. The Employee will be paid their normal wages while they are suspended, unless the period becomes protracted (generally no more than one week) as a result of undue delay caused by the employee.*

*Prior to making this decision however, I will speak with you to seek your input into this.*

*With that in mind, I plan to call you at a time to be advised by you by email as soon as possible to:*

- 1. Discuss and overview the situation.*
- 2. See if you require any further information.*
- 3. Understand if you wish to meet with Corrections.*
- 4. See if there are any duties you can undertake in the meantime.*
- 5. Talk about any other matters of concern.*

*In the meantime, please feel free to contact me to raise any other issues.*

*(Emphasis added.)*

[19] Ms Greenhalgh accepted that there was nothing to substantiate any of the other allegations put in the letter of 29 September by Corrections. The same information had also been conveyed to Ms Greenhalgh in Mr Dack's email dated 1 September 2011. The information was not given in such detail to Ms Hill at any time during the process.

[20] On 20 October 2011 a meeting was held at Whanganui between Ms Hill, Ms Greenhalgh, and a Corrections' official, Mr Peri Mason, assigned to investigate the matter. Ms Hill and Ms Greenhalgh left that meeting with the understanding that the focus was about the proper manner of inductions being done. Ms Hill and Ms Greenhalgh believed that Ms Hill would be able to return to work shortly. Ms Greenhalgh's evidence is that she was also concerned that Corrections followed the correct procedures in regard to the allegations against Ms Hill under the terms of

the contract (2.2.5 and 2.2.6). Mr Mason prepared a report that only came to light during the Authority's investigation meeting when he produced it. Ms Hill, Ms Greenhalgh and the Authority had not seen the report before it was produced.

[21] It is common ground that Ms Hill did send the postcard to the prisoner at Hawkes Bay Prison from England of the Houses of Parliament. Ms Greenhalgh considered that this was a serious matter and contrary to the Corrections' "*nothing in, nothing out*" policy. However, Ms Greenhalgh's concern was that Corrections properly follow the process under the contract. She says that she was bound by any final decision reached by Corrections. She had no further input into the decision that was ultimately made by the new Prison Manager, Ngaire Knowles who took over responsibility for the matter when she became the Prison Manager at Whanganui. Ms Knowles made the decision to cease Ms Hill's access to the Prison. The decision was conveyed by Ms Knowles to Ms Greenhalgh. The decision was absolute and in accordance with the zero tolerance under the "*nothing in, nothing out*" policy applied by Corrections.

[22] On 21 November 2011 Ms Greenhalgh advised Ms Hill of a notice of termination of employment. This was done in writing and the letter read as follows:

*I write further to our meeting held on 20 October 2011, and following the confirmation from Corrections to replace you as foundation learning tutor at Wanganui Prison.*

*I had established a phone meeting with you this morning, but you did not make that meeting, moving it to this afternoon. I then received an email from you declaring yourself unavailable for a week.*

*Notwithstanding that I am still to hear from you regarding any options or opportunities to keep your employment ongoing, I have conducted an assessment of the options from our perspective and I am unable to see any possibility for maintaining your ongoing employment.*

*Accordingly, I have decided to issue you with four weeks' notice of your termination of employment with Workforce Development Limited from today's date.*

*This means that should an alternative not be identified between now and Friday 16th December 2011, then your employment will terminate on that date.*

*I will leave it to you to contact me once you feel well enough to discuss this further with me, or you may feel more comfortable to make any submissions or suggestions in writing.*

*In any case, please feel free to contact me as soon as you are able.*

[23] Ms Hill's employment with WFD ceased with 4 weeks' notice from 21 November 2011. The employment effectively ended on 16 December 2011. She was provided with a reference of the same date.

[24] A personal grievance was raised (in writing on 21 December 2011) by Ms Hill's representative, and there has been an amendment to the remedies she is seeking. The parties attended mediation. It now falls to the Authority to make a determination.

### **Determination**

[25] Ms Hill's employment agreement with WFD subsumes the obligations under Corrections' code of conduct for behaviour in the workplace. Her decision to send a prisoner a postcard has caused the situation where she was suspended from the facility first, and then she not allowed back to work at the prison.

[26] Corrections is not a party to the employment relationship problem in the Authority, and therefore its actions cannot be the subject of the Authority's investigation, except as background to the events that occurred. Corrections has invoked its policy of "*nothing in, nothing out*" absolutely in Ms Hill's case, and undertaken an internal investigation. How Corrections has gone about that in regard to any obligations it has with Ms Hill and WFD is its business, and may give rise to other issues elsewhere. Any difficulties arising about Corrections' investigation is another matter: for example any fairness obligations it has to Ms Hill (about the process and providing information).

[27] Ms Greenhalgh was rightly concerned that Corrections followed the contractual procedure under the WFD Corrections contract. I accept that she was motivated genuinely by this during her involvement, but her adherence strictly to try and ensure the contractual terms were followed meant that a range of differences became apparent in Corrections' process. Unfortunately there are features of the process that did impact on Ms Hill, and indeed WFD. In this regard Ms Hill and WFD were affected by:

- The indications provided by Messrs Mason and Dack on a probable outcome that was different to what actually ended up happening.

- The failure of Corrections to fully engage Ms Hill in the decision-making procedure. This accounts for her and Ms Greenhalgh's surprise at the outcome.

[28] WFD became fixated with the literal process without anticipating that it had obligations to assist Ms Hill. I am supported in this conclusion by Ms Greenhalgh's evidence that whilst the sending of the postcard was serious she would have expected to have discussed it with Ms Hill but not necessarily decided on a disciplinary outcome. Also Ms Greenhalgh accepted there was no substance in the other allegations made against Ms Hill, and this was partially supported by Messrs Mason's and Dack's conclusions too.

[29] WFD's omission once the decision had been made by an unseen decision-maker (the prison manager) could have been to appeal it and asking for the opportunity to mitigate the outcome. Ms Greenhalgh accepted she did not do this. Indeed a fair and reasonable employer could be expected to have done more given Corrections did provide an opportunity for this:

*In the meantime I would appreciate if you are able to follow this up with your facilitator and look forward to an outcome or response on this matter.*

*Can this be presented in writing addressed to the Prison Manager – Wanganui Prison at your earliest convenience please.*

(Letter dated 29 September 2011 from *Hati Kaiwai Prison Manager*).

[30] Instead Ms Greenhalgh left it to Ms Hill. Ms Hill was not given the opportunity to have a professional legal and/or employment advisor. A fair and reasonable employer could be expected to have made it very clear that such advice would be advisable particularly given: (1) that there was a triangular employment arrangement, (2) that WFD could not be involved directly in the decision making and (3) that the situation could possibly impact on Ms Hill's employment. Indeed Ms Hill was not a party to the WFD and Corrections agreement. Whilst WFD did suggest Ms Hill could have a support person, and Ms Hill was assisted by her partner, there was no advice for her to get professional legal/employment advice.

[31] Once Corrections had made its decision to refuse Ms Hill access WFD advised her that her employment would be terminated for frustration under the individual employment agreement. First the individual employment agreement did make provision for what would happen if access was denied. Ms Hill signed her employment agreement and I hold has to accept responsibility for accepting the terms and is required to abide by the terms. She was given notice of the possible outcome under the employment agreement in a letter dated 29 September. However this advice was before there was any meeting with Corrections. Once that meeting occurred, Ms Hill and Ms Greenhalgh formed an opinion that there was the possibility that Ms Hill would be able to return to work. She did not have an opportunity to discuss and mitigate her position again because Ms Greenhalgh upon receiving the decision from Corrections wrote to Ms Hill dismissing her on notice. The decision was pre-emptive of any discussion on what could be further done. Such a discussion could have disclosed the nature of the decision being made by Corrections, the need for Ms Greenhalgh to approach Corrections further, and for Ms Greenhalgh to at least attempt to get any further relevant information. Instead Corrections was left to act unilaterally, and contrary to the advice being provided internally from Messrs Mason and Dack. Ms Hill and Ms Greenhalgh did not know this at the time, except that they looked forward to a positive outcome that they were led to believe was a possibility. Even although the terms of the WFD and Corrections contract do not provide terms as such, WFD as a fair and reasonable employer of Ms Hill could have been expected to approach Corrections again after the decision. This is especially so because:

- Ms Hill was not a party to the WFD Corrections contract.
- WFD has requirements to act as a fair and reasonable employer under the terms of the individual employment agreement.
- WFD provided no response and reply to the prison manager when the opportunity was signalled on 29 September. This should have been done when the outcome was announced.
- WFD had no contact at all with the prison manager whom made the decision. It was not enough to rely on the meeting of 20 October and what everyone thought the outcome of that was and wait on a decision, especially when WFD was not given Mr Mason's report and had nothing else in writing.

[32] One difficulty that has arisen in this matter has been the approach of Corrections to requests for information under the Official Information Act from Ms Hill and Mr O'Sullivan. Indeed witnesses needed to be summonsed before the Employment Relations Authority to get documents relating to Ms Hill and the decision about her from Corrections. The day before the Authority's second day of investigation meeting additional information was released by Corrections that reasonably should have been released much earlier, given Ms Hill's representative's requests to Corrections for information and that witnesses from Corrections needed to be called before the Authority (first day). This signals that in the triangular arrangements that the current procedures under the WFD and Corrections contract are not satisfactorily working to ensure fairness to everyone involved, namely Corrections, Ms Hill and WFD.

[33] The omissions in WFD's actions that a fair and reasonable employer could have taken at the time make the decision to dismiss Ms Hill unjustified because not enough was done to deal with the problem by WFD. Although the decision to dismiss was for frustration, given that Ms Hill was no longer able to work at a Corrections prison, the dismissal was not for any disciplinary matter. Indeed WFD keenly wanted Ms Hill to work and continue in its employment.

[34] Otherwise WFD's action was in the range of responses available to the employer when redeployment was not a possibility and it was entitled to rely on the terms of the employment agreement. The employer correctly provided notice. The time of the notice was also used for exploring any re-deployment. I hold that this was not fatal to the ultimate dismissal.

[35] As Ms Hill has a personal grievance she is entitled to three months lost wages or thirteen weeks (equivalent to a quarter of the year). I cannot say that Ms Hill would have been allowed to continue at a Corrections facility given that she sent a post card to a prisoner and that Corrections exercised its prerogative to rely on "*nothing in, nothing out*" policy. It could well have had grounds to continue to rely on the policy as it is applied it under zero tolerance, even if WFD made submissions and challenged the prison manager's decision. In such circumstances I am not prepared to award more than three months wages. There is no contribution on Ms Hill's part given that there was mitigating arguments about what she did, her remorse for sending the card when she found out it was included in the "*nothing in, nothing*

*out*” policy, the issues about the adequacy of induction and the conflicting opinions about Ms Hill’s actions in Corrections.

[36] I turn to the remedies. Ms Hill’s lost income amounts to \$11,128 for three months (a quarter of the year, 13 weeks) based on \$856 per week as submitted. The calculation has not been challenged. She has not been able to find alternative work at all. She has given sufficient evidence of mitigation, which I accept. There is no contribution given the evidence from Ms Greenhalgh about what she thought should have been done and my comments above. Also, I hold that it is not axiomatic that Ms Hill would have worked any longer at WFD given the failure of WFD to find any alternative employment for Ms Hill and that she could not go back to a Correction’s facility. Corrections’ zero policy meant that there was no compromise available. I am satisfied that WFD had no alternative work available.

[37] I accept that Ms Hill has been hurt and her feelings affected by WFD’s failure and omissions in its dealings on the matter between Ms Hill and Corrections. She cannot be compensated for Corrections’ action. I accept that Ms Hill was upset about WFD’s role and that it dismissed her. She was supported by Mr Hill, her husband, about how she has been affected. I award her \$8,000 compensation under s 123 (1) (c) (i) of the Act.

[38] Workforce Development Limited is required to pay Ms Hill:

- i. \$11,128 for three months lost wages
- ii. \$8,000 compensation.

### **Costs**

[39] Costs are reserved as requested by both parties.