

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 206/10  
5329307

BETWEEN                      TANYA KATTERNS  
   Applicant  
  
A N D                              FAIRFAX MEDIA LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:              Paul McBride and Tina Mitchell, Counsel for Applicant  
   Susan Hornsby-Geluk and Anne Molineux, Counsel for  
   Respondent  
  
Investigation Meeting:      22 December 2010 at Wellington  
  
Date of Determination:      24 December 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Tanya Katterns worked for Fairfax Media Limited as a Dominion Post journalist based in the Wairarapa until she was summarily dismissed on 1 December 2010 for plagiarism and loss of trust and confidence amounting to serious misconduct. Ms Katterns says that her dismissal is unjustified and seeks interim and permanent reinstatement and compensation.

[2] Despite mediation these claims have not been resolved.

[3] This determination resolves the claim for interim reinstatement. The findings expressed below are solely for that purpose. Final findings will have to wait until there is a full opportunity to test the evidence. The time available to write this determination is limited as it must be released before midday on 24 December 2010. That means that I am not able to respond as fully as I would like to the substantial

amount of affidavit evidence and counsels' comprehensive submissions. Having read all the materials and considered the submissions I have reached a clear view about the appropriate outcome and will express that as fully as I can in the limited time available.

### **The dismissal**

[4] In short what happened was that Ms Katterns wrote an article about Ron Mark in a stipulated format. That included a standfirst or opening paragraph. Ms Katterns' completed the article including the standfirst by 3 November and it was published on 6 November 2010. On 8 November 2010 Ms Katterns was asked by her direct manager for an explanation about similarities between her standfirst and the start of a piece by Deborah Coddington in the Herald on Sunday from 5 September 2010. During email exchanges that day Ms Katterns three times said that she had not read Ms Coddington's piece before submitting her own article and the standfirst. Fairfax then obtained records of Ms Katterns' internet activity which showed that she had accessed Ms Coddington's article at about 8.00pm on 2 November 2010. On 11 November 2010 Fairfax wrote to Ms Katterns identifying this as a *very serious disciplinary issue* raising issues of potential plagiarism and questions of trust and confidence in Ms Katterns as a reporter. There were several disciplinary meetings during which Ms Katterns acknowledged reading Ms Coddington's article as part of her research; explained her earlier denials by saying that she had not recognised what was emailed to her on 8 November as something that she had accessed for her research; and said that the similarities were inadvertent. Eventually Fairfax concluded that Ms Katterns had intentionally plagiarised the standfirst and misled them when first asked about it. Ms Katterns was told of her dismissal on 1 December 2010.

[5] There is a comprehensive challenge to Fairfax's justification for the decision to dismiss Ms Katterns. For its part Fairfax says that Ms Katterns cannot even establish an arguable case of unjustified dismissal. It is agreed that I should first turn to that assessment.

### **Arguable case?**

[6] For Fairfax it is said that the similarities between Ms Kattern's standfirst as submitted and the opening lines of Ms Coddington's piece are so striking that Ms Katterns must have copied Ms Coddington's work. Ms Katterns says that the

similarities are inadvertent. Her evidence is also that some of the similar phrases were used by Mr Mark during an interview or are often used by him publicly. There is evidence from others with professional or academic experience in the field to support the contention that unintentional copying can and does arise when a writer reads material written by others prior to writing something themselves. There is also evidence to the effect that this sort of copying is either less serious plagiarism or not plagiarism at all. At this stage I find that it is arguable, but not strongly so, that the similarities are inadvertent. If inadvertent or perhaps the result of carelessness it is difficult to see that a fair and reasonable employer would have dismissed in all the circumstances.

[7] A related question is how would a fair and reasonable employer view Ms Katterns' initial denials about having read Ms Coddington's article. Ms Katterns says that she did not notice when she read the story as part of her research that it was by Ms Coddington. That is why her first three replies were that she had not seen any Coddington story, had not read it in the lead up to writing her article and (somewhat apologetically) had never read anything by Ms Coddington respectively. During the disciplinary investigation Ms Katterns said that she had read the Coddington story several times since September 2010 and again when researching her article without noticing who was the author or the publisher. When responding to her manager's emails she had not recognised what he sent her as being an extract from the article previously read by her. In context her responses were not misleading or untruthful. There are two other points to mention. Ms Katterns knew that Fairfax could check her internet search activity and these matters were part of a busy schedule.

[8] At this point I cannot say that a fair and reasonable employer would have concluded that Ms Katterns misled or lied to them at first. Ms Katterns should have taken more care with her first responses to ensure their accuracy but it is at least arguable that her responses were careless but not misleading or untruthful.

[9] The two points of substance are related, since if a fair and reasonable employer would have concluded that Ms Katterns lied to or misled them at first, it would be harder to accept an innocent explanation for the similarities.

[10] The evidence about predetermination is very weak. The hold on Ms Katterns' stories is sufficiently explained by Mr Alley's evidence. Steps to implement the dismissal such as discontinuation of phone lines and computer access appear not to

have been taken until after Ms Katterns was advised of her dismissal. There is evidence in an affidavit in support by Mr Murray who attended a disciplinary meeting with Ms Katterns that, in his opinion, the decision had already been made. That seems to be Ms Katterns' view as well. These opinions barely call into question the picture that otherwise emerges of an employer who has deliberately and patiently worked through its concerns. There is also evidence from Bernadette Courtney, editor of the Dominion Post and said to be the decision maker, that she was extremely concerned about what was unfolding and was dismayed that it appeared that Ms Katterns was lying to them. Concern and dismay would be natural responses if there was reason to think an otherwise trusted and long-serving employee might be lying. Certainly there was a need for a proper explanation from Ms Katterns. I do not accept that Ms Courtney's concern and dismay is a serious indication of pre-determination on her part.

[11] After Fairfax initiated the disciplinary investigation Ms Katterns posted comment about her situation on her facebook page. That attracted some comments that were critical of the employer. It came to Fairfax's attention and Ms Katterns was asked to remove the comments. Her evidence is that she had already done so but not before it was seen by some Fairfax employees who were Ms Katterns' facebook friends. After Ms Katterns was dismissed Fairfax told some employees of the reason for her dismissal and also reminded them of Fairfax's policy about social media comments. That has led to some suggestion that Ms Katterns was dismissed for her facebook comments. However, the evidence of Ms Courtney is that this issue was not relevant to her decision to dismiss Ms Katterns. There is no substantial reason at this point to doubt that evidence.

[12] Some issues have emerged about whether all the relevant material was made known to Ms Katterns for her comment prior to the dismissal. The 11 November 2010 letter which initiated the disciplinary process says *we received complaints from Deborah Coddington and I have also had a complaint from the Editor of the Herald on Sunday*. The latter item was never given to Ms Katterns but it should have been. She was not able to refer to its tone as falling short of being a complaint. There was apparently also a discussion between Ms Courtney and the Herald editor, the content of which has not been disclosed. Ms Katterns' manager (Patrick Crewdson) first became aware of the issue by seeing a facebook posting from Ms Coddington on 6 November 2010. The next day he received via facebook an email from

Ms Coddington but that was not shared with Ms Katterns. In between Mr Crewdson apparently sent an email to his manager (Mr Alley) alerting him *that Ms Coddington had raised the matter*. Mr Alley says that he was advised in an email that Mr Crewdson had received a complaint from Ms Coddington. This email has not been shown to Ms Katterns. Ms Courtney also sought advice from two senior managers as to their views. None of that was disclosed to Ms Katterns. Ms Katterns' evidence is that she was not offered a copy of Fairfax's internet records. That is contested by Fairfax but it is a factual dispute that cannot be resolved at this point. Overall I find that it is arguable, but not strongly so, that these issues may be sufficiently serious to render the dismissal unjustified.

[13] There is some evidence from Ms Katterns to suggest that she was effectively suspended in an unlawful manner prior to being dismissed. That will partly turn on findings about what was actually said but at an early stage, in response to Ms Katterns saying that she was considerably distressed and did not feel like working, Ms Courtney responded in an email *I understand. I shall tell Patrick you are off sick till Monday*. That impresses as a considerate approach and Fairfax's position is that similar special leave was allowed at a later point as well. At this stage I do not accept that these exchanges add support to an arguable unjustified dismissal grievance.

[14] It is asserted that Ms Courtney did not consider matters that a fair and reasonable employer would have considered, in particular Ms Katterns' personal circumstances, her work history and whether there were alternatives to dismissal. Naturally the only direct evidence on these points is that of Ms Courtney who has described giving Ms Katterns several opportunities to make further submissions before announcing her final decision and the way she agonised over the decision before it was reached. There is nothing of substance to displace the picture painted by Ms Courtney's evidence as this stage.

[15] To summarise, there are some arguable points about Fairfax's process and there is an arguable case of insufficient substance to warrant dismissal. A grievance based on the former issues is unlikely to result in permanent reinstatement while a grievance based on the latter case could result in permanent reinstatement. Bearing in mind the primacy accorded reinstatement as a remedy, I conclude that Ms Katterns has an arguable case, but not a strongly arguable case for reinstatement.

**Balance of convenience**

[16] To some extent the case for interim reinstatement is advanced on the basis that Ms Katterns needs her income to meet mortgage payments and support her two dependent children, one who has current health care needs that cost about \$60.00 per week and the other who may have costly health care needs at an uncertain time in the future. There is also mention of the cost of upkeep for the animals on her 5 acre lifestyle block.

[17] A strong theme is that Ms Katterns needs to have her good work record, professional integrity and reputation restored.

[18] The third strand is that Ms Katterns has been very distressed by these events to the point of being physically sick and it has also been distressing for her children.

[19] The final point is that the prospects of permanent reinstatement will be diminished unless Ms Katterns is granted interim reinstatement.

[20] Against this, it is not disputed that Fairfax has the resources to meet any compensation award for lost wages, lost benefits and emotional distress should a grievance eventually be established. In the meantime Ms Katterns has received final pay that carries her through to near the end of January 2011. The respondent has given an undertaking to cooperate with setting an early date for a substantive investigation meeting which could have been as early as the second week in January. The financial details given by Ms Katterns are limited but it appears that there is substantial equity in her property so I do not accept that, in the short term, her only option to fund her outgoings is to sell into a slow property market. The only aspect that cannot be adequately covered either in the short term or in due course is the distress suffered by Ms Katterns' children. However, grievants often give evidence about how upset they are at witnessing the effects of their own unjustified dismissal on their children or spouse, which can be compensated. I conclude that, for the most part, distress and adverse financial consequences from what might be an unjustified dismissal can be remedied by compensation.

[21] Interim reinstatement does not restore a person's good work record, professional integrity or reputation in a case such as this. That must await final findings about whether or not the dismissal was justified.

[22] I do not accept that this is a case where the prospects for permanent reinstatement are diminished if Ms Katterns remains out of work pending resolution of the substantive grievance. Ms Katterns will not lose her obvious talent for working as a journalist or her contacts. Fairfax is clearly on notice that reinstatement is a prospect and it will have to accommodate such an order if it is made in due course.

[23] There is merit in the respondent's point that its reputation will be diminished if it is forced to re-engage Ms Katterns now but it turns out following a full investigation that she did plagiarise Ms Coddington's work and then lied about it. I accept that journalistic standards contribute significantly to a newspaper's reputation. I do not put the harm as great as *considerable damage* but it is not inconsequential as asserted by counsel for Ms Katterns.

[24] It is said that Ms Katterns' managers have lost trust and confidence in her. That begs the question whether there are grounds on which a fair and reasonable employer would have reached that conclusion so it is not particularly material at this point.

[25] Overall I find that the balance of convenience favours Fairfax. For the most part harm to her can be put right by compensation and permanent reinstatement is no less likely in due course even if interim reinstatement is not ordered now.

### **Overall justice**

[26] It is useful to stand back and consider the picture overall.

[27] An issue of similarity came to Fairfax's attention which called for some explanation. At best carelessly, Ms Katterns denied in emphatic terms having previously read the Coddington article. Upon checking, Fairfax learnt that the denials were not correct. That raised a concern about truthfulness as well as plagiarism. Fairfax understandably initiated a disciplinary investigation, following which it rejected Ms Katterns' explanations and dismissed her. There is an arguable case but not a strongly arguable case against justification.

[28] No other feature about the current situation as apparent from the affidavits and documents warrants intervention by the Authority at this stage, especially in light of the respondent's and the Authority's availability for an early substantive investigation meeting.

**Summary**

[29] The application for an order of interim reinstatement is declined.

[30] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority