IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 356
5388234

	BETWEEN	GLEN MACMILLAN Applicant
	AND	SEATING TO GO LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	G MacMillan in person E Burke, counsel for respondent
Investigation Meeting:	14 June 2013 at Hamilton
Submissions received:	21 and 26 June 2013 from applicant 21 June 2013 from respondent
Determination:	12 August 2013

DETERMINATION OF THE AUTHORITY

A. Seating to Go Limited suspended Glen MacMillan unjustifiably and is ordered to compensate him for the resulting injury to his feelings in the sum of $1,000.

B. Seating to Go Limited warned Glen MacMillan unjustifiably and is ordered to compensate him for the resulting injury to his feelings in the sum of $4,000.

C. Glen MacMillan's resignation was not a constructive dismissal.

D. There is no order for the payment of penalties for breach of good faith.

Employment relationship problem

[1] Seating to Go Limited (STGL) is in business as a provider of specialised wheelchair and seating assessment services for the Ministry of Health and the ACC. It also provides associated support services, including from technicians who repair

and service wheelchairs and related equipment. It employed Glen MacMillan as a technician.

[2] On 4 May 2012 STGL received a verbal complaint from a client about Mr MacMillan's conduct while attending at the client's home for work purposes. The client was asked to put the complaint in writing, which eventually he did by email message dated 21 May 2012.

[3] The written complaint alleged in particular that, during a visit on 2 May 2012, Mr MacMillan made abusive and derogatory comments about his employer to the client. These included comments that one of STGL's directors, Alf Kil, was 'rough, useless and only does a job half pie'. Comments of that kind had also been made in respect of Mr Kil on other occasions. Mr MacMillan was also said to have been critical of Debbie Wilson, the other director of STGL, saying she was 'just as useless' and 'was Australian and should go back there'. The complaint went on to say that on one occasion Mr MacMillan had disclosed certain personal information about the directors. It also said Mr MacMillan spoke in abusive terms of the occupational therapist with whom he was working on 2 May. Mr MacMillan was said to have called her 'useless' and a 'bitch'. The complaint ended by saying Mr MacMillan's mannerisms and lack of respect were such that the client 'cringed' and his 'anxiety starts to kick in real bad' if he was told Mr MacMillan was the technician who would be visiting him.

[4] By letter dated 21 May 2012 Mr MacMillan was asked to attend a meeting to respond to the complaint. A copy of the complaint was provided to him. The letter indicated the complaint was being treated as an allegation of serious misconduct, as the conduct in question breached the company's house rules.

[5] The meeting went ahead on 28 May. Mr MacMillan attended together with his representatives. He denied the allegations, and challenged the client's credibility.

[6] STGL undertook a further investigation. It met with the client and his wife. Both confirmed the account already provided.

[7] Pursuant to a consensus reached with Mr MacMillan's representatives during the 28 May meeting, STGL also spoke to some of its own staff members to find out

whether Mr MacMillan had a history of engaging in similar conversations. The theme of the resulting discussions was that, while at work, Mr MacMillan frequently made negative comments about the quality of STGL's management. Because of the concern caused by that information, and because of the possible effect on the staff members when Mr MacMillan became aware of their responses, STGL decided it would be better if Mr MacMillan did not attend work until the matter was resolved.

[8] STGL believed it was required to communicate directly with Mr MacMillan's representatives regarding the investigation. Accordingly it contacted one of Mr MacMillan's representatives by email on 6 June 2012, asking the representative to advise Mr MacMillan he was suspended. The message had not been received or relayed to Mr MacMillan by the morning of 7 June, when Mr MacMillan reported for work. There he was advised of the suspension. He duly left the premises.

[9] Meanwhile by message dated 30 May the representative had agreed Mr MacMillan would receive the result of the investigation in writing. Accordingly by letter dated 5 June STGL summarised the information obtained during the relevant interviews.

[10] As had also been arranged, Mr MacMillan would provide his response in writing. The outcome would be advised at a meeting on 8 June.

[11] Mr MacMillan duly provided a written response, in which he again denied the allegations.

[12] The directors concluded that Mr MacMillan probably made the comments attributed to him. They wanted him to stop making derogatory remarks about them and the company, and decided a written warning would be appropriate. They advised Mr MacMillan of the decision during the 8 June meeting.

[13] The letter of warning, also dated 8 June, was handed to Mr MacMillan at the start of the meeting. The letter said Mr MacMillan had communicated in a manner that may cause a colleague or the company to be held in disrespect. It said he was to: *'cease all comments which have the potential to cause the company or individuals working within the company to be held in contempt or disrespect.'* It also said any further breaches would result in a final written warning, or dismissal if the conduct amounted to serious misconduct.

[14] Mr MacMillan disagreed vehemently with the findings about his behaviour, and challenged the justification for the warning. He was given a week's paid leave to consider his position, then sought further periods of sick leave.

[15] During this time his representative engaged with STGL on matters arising out of the warning, including how the working relationship would proceed when Mr MacMillan returned to work. STGL proposed that Mr MacMillan would not be required to do work for the client, there would be regular meetings with Mr Kil to discuss any issues, and Mr MacMillan would receive training on what was expected by way of professional conduct.

[16] However Mr MacMillan did not return to work, and resigned on 3 August 2012. In the letter of resignation he said his suspension and the warning were unfair, and that the employment relationship had been fatally affected.

[17] Mr MacMillan has raised personal grievances on the ground that:

(a) his employment was affected to his disadvantage by STGL's unjustified actions in suspending him;
(b) his employment was affected to his disadvantage by STGL's unjustified actions in issuing the written warning; and
(c) he was constructively and unjustifiably dismissed.

[18] In addition Mr MacMillan seeks penalties for breach of good faith.

A.The unjustified suspension grievance

[19] The test of the justification for the suspension is set out in s 103A of the Employment Relations Act 2000. It concerns whether the suspension, and how it was imposed, was the action a fair and reasonable employer could take in the circumstances at the time. In applying the test, the Authority must consider, among other things, whether the employer: raised its concerns with the employee before imposing the suspension; gave the employee a reasonable opportunity to respond; and took the response into consideration before acting.

[20] The issues in respect of the suspension are:

(i) was suspension an action a fair and reasonable employer could have taken in the circumstances at the time; and

(ii) if not, what is the remedy for Mr MacMillan.

1.Was suspension the action a fair and reasonable employer could have taken

[21] The parties' employment agreement provided:

> *9.0 Disciplinary Procedures*
>
> *9.4 If, in the opinion of the employer the situation warrants it, the employee may be suspended on pay pending the resolution of the matter(s) causing concern. In such instance the employer will advise the employee as to the reasons why it believes suspension is appropriate and will take into consideration any views expressed by the employee in making its decision.*

[22] It is unfortunate that there was a misunderstanding between the parties over what information was to be conveyed to Mr MacMillan through his representative and what information was to be conveyed directly to Mr MacMillan, and that this affected the way in which Mr MacMillan was advised of his suspension. However it is not necessary to address this matter in the context of the justification for the suspension. Mr MacMillan was not in any event advised of the reasons why suspension was considered appropriate, and was not given an opportunity to express any view about the matter before the decision to suspend was made. The suspension was not imposed in accordance with the terms of the parties' employment agreement.

[23] These flaws also mean the process STGL followed did not meet the requirements of fairness which the Authority must take into account under s 103A.

[24] Overall, I find the flaws were not minor. The imposition of the suspension was not the action a fair and reasonable employer could take in the circumstances at the time.

2. What remedy is available

[25] Mr MacMillan did not lose remuneration as a result of the suspension, and it was in force for only a very limited time. Even so I accept he suffered injury to his feelings. He is entitled to compensation under s 123(1)(c)(i) of the Act.

[26] STGL is ordered to pay compensation to Mr MacMillan in the sum of $1,000.

[27] Mr MacMillan did not contribute in a blameworthy way to the circumstances of the suspension, so there is no need to consider a reduction in this remedy.

B.The unjustified warning grievance

[28] The test of the justification for the warning is also the test in s 103A of the Act.

[29] The issues in respect of the warning are:

(i) was giving the warning an action a fair and reasonable employer could have taken in the circumstances at the time in that,
- a fair and reasonable investigation was conducted,
- the conclusion that the conduct in question occurred was reasonably available, and
- a warning was an appropriate response; and

(ii) if not, what is the remedy for Mr MacMillan.

1.Was giving the warning an action a fair and reasonable employer could have taken

Fair and reasonable investigation

[30] Mr MacMillan complained of unfairness with reference to a meeting with Mr Kil on 14 May. He had been seeking to raise issues of his own, and believed the meeting was for that purpose. For his part Mr Kil had intended to give Mr Macmillan a copy of the written complaint, but he had not by then received it. Instead he advised Mr MacMillan of the complaint, and sought to reschedule the meeting. Mr MacMillan was aggrieved that he did not have an opportunity to raise his issues, but I do not accept anything in the meeting was unfair or a breach of good faith.

[31] The 28 May meeting was Mr MacMillan's opportunity to provide his account of his exchanges with the client on 2 May. He merely denied the allegations and challenged the client's credibility, when a fuller account of events of 2 May at least would have been more helpful to both parties. I accept his representatives had a point

when they raised concerns about the generalised nature of the rest of the complaint. If that aspect was to be taken any further it would be appropriate to seek more details from the client and put them to Mr MacMillan for his response.

[32] After the meeting the directors spoke again to the client and his wife. The client stood by his account of the 2 May visit and the other matters he had raised. No additional detail of the visit was provided. Both the client and his wife confirmed that personal information about the directors had been given to them, but aside from acknowledging that incident had occurred some time beforehand they provided no further detail of when.

[33] Four other staff members were also spoken to on 29 and 30 May. Three of them worked in the office where Mr MacMillan was based. A fifth staff member was not spoken to because she had clashed with Mr MacMillan previously, and Ms Wilson considered it unfair to seek her views. The staff members were spoken to because of the consensus reached at the 28 May meeting.

[34] The staff members were given details of the complaint and asked to comment on whether they were aware of similar behaviour by Mr MacMillan.

[35] In response, two of the staff members commented in a general way on Mr MacMillan's tendency to 'vent' and discuss his frustrations. The third had not observed any breaches of the company's house rules and commented on Mr MacMillan's 'black' sense of humour. The fourth expanded further to say that complaints about poor management were a constant theme of Mr MacMillan's, and Mr MacMillan frequently made derogatory remarks about Mr Kil. She said on one occasion she was present when Mr MacMillan expressed to a client views critical of the training STGL's technicians received, and Mr MacMillan had recently been critical of a high performance initiative for technicians.

[36] The approach taken to the questioning risks being perceived as a prompt to make complaints or negative statements, or as fishing for such statements. The questions should have addressed whether the staff members had any direct knowledge of the incident on 2 May, or whether they otherwise had any direct knowledge of the client and his interactions with Mr Kil or Mr MacMillan. That is not to say additional information, if offered, should be ignored even if it discloses further

matters of concern[1]. Rather, the point is that a wrong approach was taken to the questioning.

[37] Moreover the principal concerns should have been with what happened on 2 May and whether the remainder of the complaint itself had merit - not whether Mr MacMillan had a history of behaving as alleged. As at 28 May both parties should have viewed Mr MacMillan's history, if it was to be raised at all, as backup information or information relevant to an appropriate sanction.

[38] Mr MacMillan says further that the investigation was unfair because STGL did not question other clients with a view to obtaining evidence of their satisfaction with him. In saying that, he compared in an inappropriate way the requirements of the company's performance appraisal procedures with the requirements of a disciplinary investigation. Evidence of the positive views of other clients - or for that matter of ACC case managers as was also suggested - does not assist for disciplinary purposes in identifying whether the particular actions complained of actually occurred. Again while positive interactions with clients may be taken into account as backup information or because the interactions are relevant to an appropriate sanction, such material is not a substitute for information about the particular behaviour complained of.

[39] Mr MacMillan's written response to the summary provided on 5 June was to:

- say he was confident his behaviour towards clients was of the highest professional standard;
- express concern at the 'ferocity' of the allegations against him, and say he had felt 'a complete lack of objectivity and frankly thinly veiled animosity' from STGL;
- deny the client's allegations about his behaviour, and say the contents of the complaint were 'a lie';
- suggest the client had a grudge or an axe to grind, whether because of an earlier disagreement about another matter, a disagreement on 2 May about the expected time of Mr MacMillan's arrival at the client's home, or a disagreement with Mr MacMillan's partner's employer;

[1] Although it must be notified to the employee and investigated fairly if it is to be pursued

- acknowledge he had ‘complained mildly’ to staff members about certain work issues; and
- deny revealing personal information about the directors.

[40] He did not at the time - although he has done so since - raise a concern about the lack of detail of which staff members were spoken to, and precisely what they were asked. When responding on 7 June he did not, for example, have a copy of the written statement of the staff member who made allegations about his behaviour towards another client.

[41] I would in general accept that Mr MacMillan was entitled to more information about the staff interviews than he received. I would also say he could have advised STGL on 7 June that he required more information about the staff responses. Instead he simply acknowledged that he had ‘complained mildly’ about certain matters. For that reason, and because of my overall finding, I do not regard the flaw as significant.

[42] I consider the more significant flaw to be the absence of detailed information about the visit of 2 May. This prevented proper consideration of the likelihood that Mr MacMillan behaved as alleged, his culpability in the circumstances, and the respective credibility of the participants. I now turn to that matter.

The conclusion that the conduct occurred

[43] Mr MacMillan does not believe STGL had enough information on which to base its conclusions. His reasons are similar to his reasons for saying the investigation was unfair.

[44] On the account Mr MacMillan gave the Authority, the exchanges about Mr Kil probably occurred while Mr MacMillan was testing replacement parts for the client’s wheelchair. A replacement part for a faulty component also proved to be faulty. Mr MacMillan said he believed he said to the client that the company (meaning the manufacturer, not STGL) should not send a faulty replacement. However he also said he commented that he could not see why Mr Kil would acquire parts that were of no use.

[45] During the same conversation, Mr MacMillan observed some loose wires and enquired what they were for. The client told him they were left over from an earlier job, and commented that the job looked rough. Mr MacMillan asked the client who did the job, and was told it was Mr Kil. According to Mr MacMillan, the client said Mr Kil did the job half pie. Mr MacMillan did not recall if he commented. Otherwise he said his response was to suggest the client take the matter up with Mr Kil.

[46] Mr MacMillan said there was another occasion when comments to the effect that Mr Kil did not know what he was doing might have been made. He was attempting to carry out a modification to the client's power chair, but was not succeeding. He said the client had already discussed the necessary procedure with Mr Kil, and the client said to him that Mr Kil did not know what he was doing. Mr MacMillan said he responded that Mr Kil could not be expected to foresee the problem which had arisen.

[47] Mr MacMillan continued in the Authority to deny making the alleged statements about the occupational therapist, and about Ms Wilson.

[48] Information of the kind provided to the Authority should have been either sought or offered at the 28 May meeting. Without that, debates such as whether Mr MacMillan had a history of similar behaviour or whether he had good relationships with other clients missed the point. Secondly, in the absence of any detail about the circumstances it was not possible to properly test the client's accusations or Mr MacMillan's denials.

[49] The information provided to the Authority suggests a significant area of difference lay not in whether the comments were made, but who made them, when, and how they came to be made. To resolve that it was particularly important that Mr MacMillan's version of events be obtained, that it be raised with the client, and that the client's response obtained.

[50] For their part the directors considered the material available to them and, except for the allegations of disclosure of personal information about them, concluded Mr MacMillan probably had made the comments complained of. The material included the initial complaint, Mr MacMillan's denial, the further discussions with the

client and his wife after Mr MacMillan's denial, the interviews with the staff members, and Mr MacMillan's written response.

[51] The directors explained their findings in a supplementary document also provided to Mr MacMillan at the time. They said they believed the client, and considered the staff members' reports of Mr MacMillan's comments about Mr Kil were consistent with comments alleged in the complaint. They did not accept Mr MacMillan's denials.

[52] I accept that they also took into account the challenge to the client's credibility. They were aware of certain aspects of his reputation, but Mr Kil also had direct knowledge of the client because he, too, worked with him. As a result Mr Kil considered the known aspects of the client's behaviour were different in kind from the concerns being raised about Mr MacMillan. In general it was open to him to draw such a distinction, but that is not the end of the matter.

[53] Overall, while STGL made a genuine attempt to follow the requirements of a fair procedure I consider the failure to obtain more detailed information about the client's allegations - beyond what was said in the complaint - was a critical omission. It left the directors with no context on which to base their assessment of whether Mr MacMillan was likely to have behaved as alleged. In the absence of this information reliance on conclusions as to credibility was not sufficient. The failure was a significant flaw.

Appropriateness of a warning

[54] Schedule D of the employment agreement included in a list of examples of conduct considered serious misconduct:

> *Actions or attitudes of a nature which may cause Composite Services (sic) or fellow employees to be held in contempt or disrespect.*

[55] STGL believed Mr MacMillan's conduct was within that category, but took into account his length of service and decided to issue a warning.

[56] The disciplinary procedure in the parties' employment agreement provided that the outcomes possible after a disciplinary investigation included: no further action

being taken; a formal written warning would be issued; or dismissal could occur. A formal written warning process would usually entail a first written warning for the first occurrence of the conduct in question, followed by a second and final written warning if the conduct occurred again, with the third occurrence leading to dismissal.

[57] If Mr MacMillan had behaved as alleged, I would accept a first written warning was appropriate. STGL would have been entitled to seek to correct the behaviour complained of.

Conclusion

[58] The flaws in the investigation mean I find the decision to issue a warning was not one a fair and reasonable employer could have made. I conclude the warning was not justified.

2. What remedy is available

[59] Mr MacMillan did not lose any remuneration as a result of the warning. Any loss of remuneration was the result of either exhausting any entitlement to paid leave prior to the termination of his employment, or the termination of his employment.

[60] I accept Mr MacMillan suffered injury to his feelings. He is entitled to be compensated for that injury, under s 123(1)(c)(i) of the Act.

[61] In setting an appropriate amount I take into account that the injury was probably aggravated by Mr MacMillan's own tendency to exaggerate and overstate STGL's errors and omissions, and to understate his own behaviour. For example the allegations against him were not 'ferocious' and I do not accept he was faced with 'thinly veiled animosity'. There are numerous other examples in the written material he presented to the Authority. In contrast, his use of language leads me to consider it likely that what he termed 'complaining mildly' was perceived by listeners as more than that. He has not shown any insight into the probable effect on listeners of his 'venting'.

[62] I turn to whether Mr MacMillan contributed in a blameworthy way to the circumstances of the warning.

[63] As Mr MacMillan is under the same duty of good faith as his employer, he has some responsibility for the failure to give his employer the account he gave the Authority. I apply a small reduction to recognise that.

[64] I did not hear evidence from the client and am unable to make any further findings about the behaviour alleged in the complaint. There will be no further reduction.

[65] In balancing these factors I conclude that an award of $4,000 is appropriate. STGL is therefore ordered to pay compensation to Mr MacMillan in the sum of $4,000.

C.Was Mr MacMillan constructively dismissed

[66] There are three well-recognised grounds on which a resignation may be found to be a constructive dismissal. They are that: the resignation was coerced; the employer engaged in a course of conduct with the intention of obtaining a resignation, or a breach of duty by the employer caused the resignation.[2] The third is relevant here, and the issues arising are:

(i) was there a breach of duty by the employer;
(ii) did it cause the resignation; and
(iii) if so, was the breach so serious as to make it reasonably foreseeable resignation would follow.[3]

1.Was there a breach of duty by the employer

[67] There were breaches of duty by the employer in respect of the suspension and the warning, as identified above.

2. Did the breach of duty cause the resignation

[2] Being two of the three categories in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372
[3] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168

[68] Mr MacMillan's deep sense that he had been treated unfairly caused his decision to resign. During the Authority's investigation he identified multiple areas of unfairness, several of which I do not accept and do not consider it necessary to detail. Those which I do accept have already been referred to. I further accept these factors contributed to the decision to resign.

3. Was the breach so serious as to make it reasonably foreseeable resignation would follow

[69] Mr MacMillan's decision to resign was out of proportion to any wrong that was done to him. I do not accept that the breaches identified above were so serious as to make it reasonably foreseeable that his resignation would follow.

[70] For that reason I find Mr MacMillan was not constructively dismissed.

E.Penalty for breach of good faith

[71] Mr MacMillan's submissions regarding breach of good faith were substantially concerned with the matters relevant to the justification for the suspension and the warning respectively. Although I have not recorded all of them, I have taken them into account in determining the questions of justification with reference to Mr MacMillan's personal grievances.

[72] It is not appropriate to grant dual remedies under the personal grievance procedure and in respect of any breach of good faith, when the underlying actions complained of are the same. Nor is it appropriate to exclude for the purposes of remedy matters which are relevant to justification under the personal grievance procedure, on the ground that these matters are also raised separately as breaches of good faith.

[73] Further, relevant aspects of the threshold in s 4A of the Act for penalties for breach of good faith are that the breach was:

- deliberate, serious and sustained; or
- intended to undermine an employment relationship.

[74] The breaches identified did not reach that threshold. In particular such breaches as occurred were not deliberate but rather misinformed, and were not intended to undermine the employment relationship.

[75] For these reasons I make no order for a penalty for breach of good faith.

Costs

[76] Costs are reserved.

[77] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority