IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 144/08
5110922

	BETWEEN	Megan McLeay Applicant
	AND	Radius Residential Care Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Alan Miller for Ms McLeay Sally Leftley and Eleanor Robinson (final submissions) for the Company
Investigation Meeting	Palmerston North, 9 October 2008
Submissions Received	By 20 October 2008
Determination:	28 October 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Following a disciplinary hearing on 2 November 2007 and by letter dated 8 November (document 23 in the company's bundle) the company issued Ms McLeay with a final written warning for poor performance and conduct. Ms McLeay says the warning amounts to an unjustified disadvantage because the grounds asserted for its justification were not such as to justify a final warning and the process used was unsound. She seeks compensation for humiliation of $5,000 and costs of $1,500.

[2] The company says that, at the disciplinary meeting, Ms McLeay – through her representative – refused to answer any questions other than by way of a pre-prepared written statement, and that the serious nature of the company's concerns and the risks to its financial viability justified the issuing of a final warning.

[3] At the investigation I received evidence from Ms McLeay and from Ms Ann Bedford, the Company's national operations manager and the final warning decision maker.

The Facts

[4] The company provides casual and temporary labour on an agency basis to the care industry.

[5] Ms McLeay was employed as a co-ordinator at the company's Palmerston North branch, commencing 7 June 2006, and then as its manager from January 2007.

[6] In a letter dated 10 October Ms Bedford advised the applicant of her *"… serious concerns with regard to your performance and conduct, that could result in disciplinary action"* (document 17). The letter particularised those concerns, which were (in summary) that Ms McLeay had failed to send out weekly invoices to clients for over 3-weeks, failed to follow up visits to clients as previously discussed and failed to respond to emails.

[7] Ms McLeay sought and received clarification of Ms Bedford's letter including that the applicant *"was aware of the bad debt situation and the financial pressures on the organisation"* (document 19).

[8] At and following the 2 November disciplinary meeting, and under advisement, Ms McLeay provided the company with only written responses to its concern.

[9] In respect of the first allegation, that she failed to send out weekly invoices for over 3 weeks and did not inform her management of the same, Ms McLeay detailed other tasks required of her during the relevant period, being absent

on sick leave, explained that delays occurred in receiving invoices, how historically she always aimed to send invoices out within a week of receiving them, that – on this occasion – the invoices were only effectively one week late and that it had never been indicated to her that there was a bad debt crisis requiring action on her part.

[10] In respect of the second allegation, of not following up visits to clients, Ms McLeay detailed her client contacts in the relevant period, having to prioritise tasks because of being short staffed in the Palmerston North office and the limits of her role per her job description.

[11] In respect of the allegation she had not responded to emails, Ms McLeay again pointed to the demands of her role and being short staffed, the office computers not working and her being ill, and the fact that the originating emails did not stipulate any urgency.

[12] The company issued its final warning by letter dated 8 November (document 23).

[13] In particular, Ms Bedford did not accept there had been any significant delay in the invoices reaching the applicant, that Ms McLeay understood *"the critical nature of this task and also the precarious financial situation of the company* (and that t)*his task should have been a top priority for you* (and) *the time period you have referred to was not an exceptionally busy time as you have claimed* (and) *you had extra support … for this period"* (document 23).

[14] In respect of the second allegation, Ms Bedford found that her *"verbal and written instructions* (were) *very clear in that they stated that site visits are essential and urgent"* (above).

[15] As for the last allegation, Ms Bedford advised *"I have always impressed upon you the importance of communication. It is therefore extremely disappointing to learn that unless I specifically state a day by which I expect a reply you do not consider it important enough to respond"* (above).

[16] Shortly after issuing the final warning, and by email dated 20 November, Ms Bedford forwarded to Ms McLeay an action plan setting out identified goals and actions required in respect of client visits, invoicing, communications,

accountability and delegation of routine tasks (document 24). The plan was subsequently clarified as a result of answers from Ms Bedford to specific written questions from Ms McLeay (document 25). The plan, as clarified, stipulated that all goals were to be reviewed monthly by Ms Bedford who accepted that *"goals may not be achieved in one month but steps towards achieving goals will be monitored"* (above).

[17] Ms McLeay filed her grievance with the company in a letter dated 20 November (document 26).

[18] During the Authority's investigation, Ms Bedford confirmed that – in coming to her decision to issue a final warning – she relied on clause 22 of the company's employee handbook which provides for, amongst other things, the issuing of a written final warning when misconduct or substandard work performance is considered serious enough (sub-clause 22.3; emailed to the Authority by the respondent's representative on 7 October 2008).

[19] Separate and unrelated to this problem, Ms McLeay's employment was terminated by the company in early 2008.

Company's Position

[20] Amongst other submissions, the Company properly accepts that in coming to its decision to issue Ms McLeay with a final warning it was obliged to ensure fair process: *New Zealand (with exceptions) Food Processing IUOW* v *Unilever New Zealand* [1990] 3 NZILR 35 and *Murphy* v *Steel & Tube New Zealand*, unreported, 16 October 2007, Couch J, CC 18/07, including giving the application specific allegations, the likely consequences if they were established, a real opportunity to respond and unbiased consideration of any explanation.

[21] The Company similarly accepts that warnings of poor performance should be explicit and fair and give clear information about required improvements: *Trotter* v *Telecom Corp of New Zealand* [1993] 2 ERNZ 659.

[22] It submits that, consistent with s. 103A of the Employment Relations Act 2000 and in all the circumstances, the meeting with the applicant on 2 November

2007 and the resulting warning letter were consistent with those requirements.

[23] The Company says that all the circumstances at the time included Ms McLeay: being a senior employee; that she was operating an autonomous business unit; had a full understanding of the requirements of her role and had met with Ms Bedford during which the latter vocalised clear instructions as to priorities and tasks to be completed. Ms McLeay was intrinsically involved in the financial management of the business, was not yet adhering to basic business principles and the Company was haemorrhaging money to the extent its survival was in issue.

Ms McLeay's Position

[24] Because of my finding in favour of the applicant there is no need to reflect closing oral submissions made on her behalf.

Findings

[25] As agreed by the parties at the Authority's investigation, s. 103A of the Act sets out the relevant test: the question of whether an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[26] At issue is the employer's action of issuing a final performance warning.

[27] It is common ground that the final warning was not preceded by any earlier, formal warning. This was despite the relevant provisions of the company employee handbook setting out the usual warning process (clause 20); namely the employer first advising of its concerns, and giving the employee a reasonable opportunity to improve, before moving to a formal meeting and specific allegations.

[28] The company says however that performance issues had been raised with Ms McLeay and – in light of those communications and the seriousness of her performance shortcomings and resulting financial concerns, and as

provided for in sub-clause 22.3 of the employee handbook – it was justified in issuing a final warning.

[29] In particular, Ms Bedford says she met with the applicant on a number of occasions from August to November, 2007 and made clear to Ms McLeay her concerns about the latter's performance. Ms Bedford relied on minutes of those meetings (document 7) and various emails to the applicant (documents 9, 11 & 12).

[30] Ms McLeay disputes Ms Bedford's records of their meetings; she says she never sighted the records and points to the absence in the emails of any clear warnings. The applicant also points to her 3-monthly performance review which, as at 28 June 2007, contained no warnings or expressions of concern about her performance; the entry under the heading *"Summary of Further Actions from Performance and Development Review"* is blank (p 5, document 6).

[31] I accept the applicant's position: from the evidence before the Authority I find that the company's concerns about Ms McLeay's performance and conduct were – objectively measured – not clearly and expressly set out by the respondent until its letter of 16 October. While the company's finding about Ms McLeay being *"aware of the bad debt situation and the financial pressure on the organisation"* was not raised in that advice, it was set out in a fax dated 30 October 2007 responding to Ms McLeay's request for more information (document 19). Ms McLeay responded to that issue in advance of the 2 November meeting (document 21) by advising that – while aware of bad debts – she had been instructed that other employees were following them up.

[32] However, Ms McLeay's election through her representative to reply only in writing fell short of the requirement of s. 4 (1A) of the Act: that the duty of good faith *"requires the parties to an employment relationship to be active and constructive in establishing an maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative"*.

[33] It is not active and constructive to restrict communication to a written exchange, but is instead artificial and severely limits the parties' abilities to work through serious issues and explore – fairly and reasonably – appropriate outcomes. It also hampered Ms McLeay's ability to put to Ms

Bedford's, and work through, her concerns about the latter's *"modus operandi"* and *"predetermine*(ation)*"* (par 13 of the applicant's first witness statement).

[34] But, by failing to communicate to the applicant what it describes as serious concerns about her performance prior to 16 October and shortly thereafter issuing her a final warning, the company likewise did not meet its obligation to be *active and constructive, responsive and communicative*. The company's failure to communicate to Ms McLeay its concerns about her performance, before issuing a final warning, was therefore unjustified.

[35] Further support for this conclusion, and the only relative seriousness of Ms McLeay's performance shortcomings, is found in Ms Bedford's communication of 20 November to the applicant, setting out an action plan for her (document 24); the company did not adequately explain why this action plan followed rather than preceded the final warning, despite its claims as to the seriousness of Ms McLeay's performance shortcomings.

[36] Those claims, as to the seriousness of Ms McLeay's performance shortcomings, are not borne out by the review timelines provided for in Ms Bedford's performance plan, of goals being reviewed monthly **without** having to be achieved in that period (document 25).

[37] Having regard to the facts of this situation and *Trotter* (above) I find that the action plan is evidence of what was required of the company **before** moving to a final warning. It is evidence of the company's ability to accommodate the setting and achieving of fair, measurable standards within a reasonable period, before moving to a final warning in the event Ms McLeay's performance had not improved.

[38] In reaching this conclusion I accept that the company had legitimate reason to communicate its concerns about Ms McLeay's performance, and to expect her over time to address and meet those concerns. What I do not accept is that the company justifiably stepped beyond the usual process it set for itself in its employee handbook to issue a final warning before putting Ms McLeay fairly on notice of its legitimate concerns and giving her a reasonable opportunity to meet those concerns.

Remedies

[39] Ms McLeay seeks compensation of $5,000 for humiliation and costs of $1,500. Little evidence of distress occasioned by the warning was set out in either the applicant's statement of evidence or her witness statements. However, at the investigation, Ms McLeay clearly displayed distress in respect of this employment problem. That unhappiness toward the company is no doubt stronger as a result of Ms McLeay's subsequent termination, for reasons I am informed that are unrelated to this problem. However, in the absence of any earlier advice I am satisfied that notice of a final warning had significant impact on Ms McLeay and $4,000 compensation is properly awarded.

Contributory Fault

[40] It was the company's election to both forward the letter of 16 October setting out its serious concerns and to issue Ms McLeay with a final warning. However, as I make clear above and in breach of her obligations to be responsive and communicative, Ms McLeay elected to respond to her employer's concerns only in writing. For that reason I am satisfied Ms McLeay contributed to her grievance and the remedy should be reduced by 25%.

Determination

[41] The company is to pay to Ms McLeay the sum of $3,000 (three thousand dollars) as compensation for the humiliation it caused.

[42] While costs are reserved at the parties' request, I note here that – subject to the parties' submissions if agreement cannot be reached – costs typically follow an event such as this problem and those being sought are within the parameters typically awarded by the Authority less the amount incurred for undertaking mediation.

Denis Asher
Member of the Employment Relations Authority