

Attention is drawn to paragraph 1 of this determination prohibiting the publication of the applicant's name.

Determination Number: AA 217/01
File Number: AEA 642/01

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ms M (Applicant, name suppressed))

AND Department for Courts (Respondent)

REPRESENTATIVES Poi Teei, for the applicant
Justine O'Connell, for the respondent

MEMBER OF AUTHORITY James Wilson

INVESTIGATION MEETING 21 November 2001

DATE OF DETERMINATION 10 December 2001

DETERMINATION OF THE AUTHORITY

Prohibition on publication

1. The applicant has requested that, for personal and family reasons her real name not be made public. The respondent has no objection to this request. I have considered the applicant's request and accept that this is an appropriate case in which to prohibit the publication of her name. For this reason I will refer to the applicant, throughout this determination, as Ms M. In terms of s. 10 of the second schedule to the Employment Relations Act 2000, publication of any information that may lead to the identification of the applicant is prohibited.

The employment relationship problem

2. Ms M was employed by the respondent, the Department for Courts, for approximately six years. On 28 May 2001 she was dismissed *for serious misconduct under the Department for Courts code of conduct*. In a statement of problem received by the Authority on 31 August 2001, Ms M asked the Authority *to determine whether (her) dismissal was unjustified, harsh or unfair*. Ms M requested that the Authority order:

- Interim and then full reinstatement.
- Reimbursement for lost wages.
- Compensation for humiliation, loss of dignity and injury to feelings.

3. In their statement in reply the Department for Courts (the Department) said that Ms M's employment had been terminated *after a full and fair investigation into a serious allegation regarding a breach of her employment agreement that came to the attention of her employer*

through a complaint by a member of the public. The Department opposed both interim and permanent reinstatement.

Application for interim reinstatement

4. In a telephone conference with the parties' representatives shortly after the receipt of Ms M's application, Mr Teei agreed that his client would not pursue her application for interim reinstatement. She would continue to seek permanent reinstatement.

Background

5. On 30 April 2001 the Support Services Manager at the Auckland High Court, Ms Deborah Collins, was made aware of a complaint that had been received from a member of the public regarding Ms M. After some preliminary enquiries Ms Collins advised Ms M, on 1 May 2001, that she wished to meet with her to discuss allegations of misconduct. She advised Ms M that she could bring a support person to the meeting with her. Later that day she met with Ms M and a support person and advised her that the Department had received a complaint that:

She had used Department for Courts stationery to write personal communications and that it was alleged that this communication was of a threatening nature.

Ms Collins says that she advised Ms M that she would be conducting an investigation into the allegations and would keep her informed.

6. Over the next few days Ms Collins met the complainant. In her statement of evidence Ms Collins said:

I met with L as arranged on Monday the 7th of May. We went to the staff tea room where she showed me the original documents which included a letter and compliments slip on Auckland High Court letter head paper, an OHMS envelope, and a Judge's Chambers envelope. The Judge's Chambers envelope had been stamped with the High Court Seal.

7. On 8 May Ms Collins again met with Ms M and her representative. At this meeting she outlined the allegations and the process she would be following to investigate these allegations. At this meeting she gave Ms M a letter outlining this process and inviting her to a further interview to allow her (Ms M) to respond to the allegations. The letter said that the allegations against Ms M were that she had:

- *used departmental letterhead stationery for private purposes.*
- *issued on departmental letterhead stationery written threats to another member of the public known to both the complainant and yourself.*

The letter went on say:

As mentioned the allegations are serious, and if substantiated, may result in disciplinary action against you, including the possibility of dismissal.

Please note that you are entitled to union, legal or other representation of your choice at this interview and all times throughout the subsequent employment investigation.

8. At the subsequent meeting (14 May 2001), Ms M acknowledged that she had used departmental stationery and the Court Seal. By way of explanation she said that she had used departmental letterhead to make the communications look nice and professional. She had not appreciated the seriousness of her actions and that she had not meant to do anything wrong.

9. On 15 May 2001 Ms Collins wrote a report to Mr Rob Handyside the Regional Manager for the Department. (Mr Handyside had the appropriate delegated Authority to deal with matters of serious misconduct and dismissal). Ms Collins' report outlined her investigation and included the finding that:

I believe that this investigation has proven serious misconduct by Ms M.

And the recommendation that:

..... a disciplinary meeting be held with Ms M and appropriate action be taken.

10. On 17 May Mr Handyside wrote to Ms M enclosing a copy of Ms Collins' report and inviting her to attend a disciplinary meeting with him on 23 May 2001. In this letter he *strongly recommended* that Ms M have representation at this meeting. Before the meeting on 23 May Mr Handyside received a detailed submission from Ms M. In his statement of evidence Mr Handyside says that *he re-read these submissions 3 or 4 times prior to the disciplinary meeting.*

11. At the meeting on 23 May, after discussing with Ms M and her representative (Ms Kerry Davies from the PSA) the seriousness of Ms M's actions, Mr Handyside indicated to Ms M that he had formed a preliminary decision to dismiss her. He invited Ms Davies to make further submissions on this preliminary decision prior to his reaching a final decision. The next day Mr Handyside received a written submission from Ms Davies.

12. On Monday 28 May Mr Handyside met again with Ms M and confirmed his decision to dismiss her. This dismissal was to be effective immediately and was confirmed in a letter the following day.

The applicant's position

13. Mr Teei on behalf of Ms M, confirms that Ms M admits that she wrote two letters using departmental stationery. She also admits that she used a Judge's Chambers envelope and stamped this envelope with the High Court Seal. However Mr Teei says that the investigation process was unfair and that Ms M was treated unfairly and harshly.

Unfair process

14. In her statement of evidence to the Authority Ms Collins outlines a number of issues which were never put to Ms M and were not included in Ms Collins' report to Mr Handyside. These include the alleged theft of two dictaphones, that the complainant was afraid of retribution from Ms M and that the complainant was contemplating taking out a protection order against Ms M. Mr Teei argues that although Ms Collins decided that these issues were irrelevant they may have influenced the tenor of her report and its recommendation. Mr Teei also suggests that even though these matters were not in Ms Collins written report it was likely/possible that she had discussed them with Mr Handyside thereby influencing his decision. Ms M had no opportunity to refute these allegations.

15. Ms Collins, when questioned about these comments, said that these issues were included in her evidence for completeness but that, as no substantive evidence was available, she had decided that they should form no part of her report to Mr Handyside. Mr Handyside in his turn was adamant that he had not discussed these issues with Ms Collins and that his decision was based entirely on Ms Collins' written report and his own discussions with Ms M and her representatives.

Harsh treatment

16. Mr Teei argues that Ms M had been a member of the Court staff for over six years, she had no intention to break the rules and the use of Court stationery was a lapse on her part. She did not at any time believe using Court stationery was a serious matter and she certainly did not appreciate the consequences of her actions. Her dismissal was an over-reaction by the employer.

17. Mr Handyside said that, as an employee with six years' experience, he expected Ms M to have sufficient judgement to know that her actions were totally unacceptable. He explained that the duties of a person in Ms M's position included handling documents, representing the Department in the Court room and following up actions requested by High Court Judges. Her position therefore required significant trust. Mr Handyside stated that he believed it was reasonable for the Department to decide not to continue to invest that trust in her. He said he felt that although he knew how much Ms M regretted her actions he no longer felt that the Department had the necessary trust in her to perform the role.

Legal considerations

18. In determining whether Ms M has a personal grievance it is necessary to consider the circumstances of her dismissal in the light of the Employment Court's decision in *Drummond v. Coca-Cola Bottlers NZ Ltd* [1995] 2 ERNZ 229 at 234 where the Court said:

The initial question for the (Tribunal) is solely this: on the basis of the inquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgement about the quality of the inquiry and the quality of the decision based upon it.

19. The elements of what constitutes a fair and reasonable inquiry were set out by Judge Goddard in the Employment Court in *NZ Food Processing IUOW v. Unilever NZ Ltd* [1990] 1 NZILR 35, 46:

The minimum requirements can be said to be:

- 1. Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
- 2. An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
- 3. An unbiased consideration of the workers explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

20. Ms M's primary argument is that her dismissal was unduly harsh under the circumstances. The Employment Court statement in *Read v Air New Zealand* [1991] 3 ERNZ 139 at 146, is relevant in this regard:

The breach of trust was serious and of such nature as to warrant a fair and reasonable employer deciding that she should be dismissed. That being so, it is not for the Court to substitute its judgement as to what penalty should or should not have been imposed.

21. The Court of Appeal decision in *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487 discussed the kind of conduct that will justify summary dismissal. The Court said:

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.

The law applied to Ms M and Determination

A fair and reasonable inquiry?

22. Ms M does not deny the allegations against her. Nevertheless Mr Teei has argued that the investigation process was unfair because Ms M was not given an opportunity to comment on the issues which, while not included in Ms Collins report, may have influenced both Ms Collins recommendation and Mr Handyside's decision. I accept that Ms Collins could have been influenced by the background information that came to her attention during her investigation. However both Ms Collins and Mr Handyside were adamant that this information was not conveyed to Mr Handyside and could not therefore have influenced his final decision. I accept their evidence in this regard. I find that the Department's investigation into the allegations against Ms M was full and fair and met the minimum requirements set out in *Unilever* (supra).

Harsh treatment?

23. Mr Teei suggested that Ms M's dismissal was an over-reaction by her employer and that she has been unfairly and harshly treated. Mr Handyside on the other hand, said that he believed that Ms M's actions were deliberate. She had been employed for six years and must/should have been aware of the status of the Court stationery and Seal. She had knowingly used Court stationery to threaten a member of the public. Mr Handyside said that Ms M's actions clearly fell within the definition of serious misconduct. Mr Handyside was adamant that the position occupied by Ms M required significant trust and that, *given the incidents it was reasonable for the Department to decide not to continue to invest that trust in her*. Mr Handyside said that, having reviewed all the evidence and Ms M's statements in mitigation, he had no alternative but to dismiss.

24. Under all the circumstances I find that Ms M's actions did amount to serious misconduct and that dismissal was within the range of options open to a *reasonable and fair employer*. (*BP Oil -- supra*).

25. Ms M's dismissal was justified. She does not have a personal grievance against the Department for Courts.

Costs

26. At the request of the parties, costs are reserved. Mr Teei and Ms O'Connell are urged to reach agreement on this matter on behalf of their clients. If they are unable to do so the respondent may, within 21 days of this Determination, file and serve an application for an award in respect to costs. The applicant will be given 14 days in which to respond.

James Wilson
Member of Employment Relations Authority