

Attention is drawn to paragraph [4] prohibiting publication of certain information contained in this determination.

Determination Number: CA 112/05
File Number: CEA 75/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Clair Newcombe (Applicant)
AND Rata Te Awhina Trust (Respondent)
REPRESENTATIVES Clair Newcombe In person
Barbara Greer on behalf of the Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 20 July 2005
DATE OF DETERMINATION 19 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Clair Newcombe worked for the Rata Te Awhina Trust in Greymouth from about March 2004 until she resigned effective 9 September 2004. She received a verbal warning on 2 August 2004 which she challenges as procedurally and substantively unjustifiable. That is the first part of her problem. After the warning, Ms Newcombe took up her concerns about it with her employer, without resolution. Ms Newcombe then resigned having become disgruntled about the warning, the response to her attempts to resolve that and her employer's behaviour towards her which she characterises as hostile. This second part of her problem concerns the termination of her employment.

[2] Barbara Greer is the Tumuaki of the Rata Te Awhina Trust. Mrs Greer provided a statement in reply on behalf of the Trust. In that reply the Trust says that it was for Mrs Greer as Tumuaki to determine whether there had been a breach of confidentiality by Ms Newcombe that resulted in the warning and that the Authority does not have jurisdiction to challenge that determination. Reference is made to the Tumuaki's responsibility for ensure the Trust complies with its obligations under the Official Information Act 1982 and the Privacy Act 1993. At the investigation meeting, reference was also made to the Employment Relations Act 2000 which the Trust contends excludes Ms Newcombe's dispute about the warning from the definition of a personal grievance. The Trust also says that Ms Newcombe simply resigned to take up another position.

[3] To resolve the first part of the problem, I must outline the circumstances leading up to the warning and consider how the Trust made and implemented its decision to warn Ms Newcombe.

The law concerning this type of personal grievance claim must then be set out and applied to those facts. That will also provide an answer to the jurisdictional points made by the Trust. To determine the second part of the problem, I must make findings about why Ms Newcombe resigned and whether a resignation in those circumstances can give rise to a personal grievance with regard to how that has been defined in earlier cases.

[4] It was not possible for me to understand the problem without evidence about the circumstances of a Trust client. Ms Newcombe provided some documents with her initial application and there was some evidence about the client's circumstances during the investigation meeting. In this determination, it will not be necessary to refer to the client by name or her circumstances in any detail and I confirm the order made during the investigation meeting prohibiting the publication of the client's name or any details about her circumstances.

What happened to cause the warning?

[5] In late April 2004, the client made a complaint about her case worker concerning information about the client's partner. After some investigation, the Trust transferred the client to Ms Newcombe's case list in late June 2004. Ms Newcombe was not initially given the file and was not fully briefed on the background to the transfer and the complaint. That said, she had some idea about the complaint through her work in the office. The former case worker repeated to Ms Newcombe the information about the client's partner but did not caution Ms Newcombe not to repeat it to the client. It is fair to say that Ms Newcombe did not appreciate the sensitivity of the situation.

[6] In her dealings with the client, Ms Newcombe made reference to the information about the client's partner and identified who had told her about it. It was Ms Newcombe's judgement that she needed to discuss the information with the client in order to properly support and work with the client. However, the client reacted negatively. Later, on or about 12 July 2004, Ms Newcombe spoke with her team leader (Richard Wallace) about that exchange with the client and the client's negative reaction. Mr Wallace told Mrs Greer about that.

[7] The matter was discussed at a team leaders' meeting on 30 July 2004. There are minutes of that meeting, there is no reason to doubt their accuracy and what happened in respect to Ms Newcombe is usefully set out in the following extract:

Tumuaki (Barbara) talked of issues happening among staff at present. Meeting was called to strategise and discuss how we as a group can move through this in the most positive manner.

Richard spoke of breaches around workers discussing and disclosing issues to clients relating to colleagues. We discussed in depth how we might address this serious misconduct. There appears to be a lot of staff dissent at the moment. Decided to use the policy manual in order to reinforce the meaning of them. Will use pages 41 to 47 dealing with confidentiality and Code of Conduct. ...

[8] On 2 August 2004, Ms Newcombe was called in to a meeting with Mrs Greer and Mr Wallace. Mrs Greer told me that she was not able to recall the whole content of the meeting but that there was discussion about breach of confidentiality and that she told Ms Newcombe that she would be issuing a verbal warning. Mrs Greer thought that she was being lenient. There is no reason to doubt Mrs Greer's evidence. Equally, there is no reason to doubt Ms Newcombe's evidence. She said that Mr Wallace came and got her for a meeting but she did not know its purpose. Mrs Greer told her that it was about the breach of confidentiality and asked her if she

thought her actions had been a breach. Ms Newcombe was not able to effectively answer because she was unprepared. Mrs Greer then told her that it was serious misconduct and that she would receive a verbal warning. I accept Mrs Greer's evidence that she also said that a note would be made for Ms Newcombe's file. In evidence, Mrs Greer doubts that she would have described the misconduct as *serious* but in light of the description in the minutes, I accept Ms Newcombe's evidence on that point.

[9] Subsequently, Ms Newcombe challenged the warning but it is not necessary to detail those events at this stage. However, I should make it clear that the Trust had not received any complaint from the client or from the case worker in respect of Ms Newcombe's actions.

[10] The Trust has comprehensive human resource policies and procedures. They contain definitions of misconduct and serious misconduct and a hierarchical warning system that means that a person with a first warning is at greater risk of dismissal than otherwise. The warning therefore placed Ms Newcombe at risk of greater dismissal.

Warnings as a personal grievance

[11] Section 103 (1) (b) of the Employment Relations Act 2000 defines a grievance to include a claim by an employee that their employment, or 1 or more conditions of their employment, is affected to their disadvantage by some unjustifiable action by the employer. Subsection (3) says that unjustifiable action does not include an action deriving solely from the interpretation, application or operation of an employment agreement.

[12] In *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering etc IUOW* [1989] 3 NZILR 785 the Court of Appeal held that a final warning can constitute grounds for a personal grievance and observed that it would follow that a lesser warning may also constitute a grievance. There has been no relevant change to the statutory definition since then and employees have subsequently brought and succeeded in personal grievance claims about such warnings.

[13] The Trust raises two points about jurisdiction. In the many employment cases about warnings, the exclusion now expressed in subsection (3) has never prevented the employee challenging the employer's action even though the employer's action does usually derive from the application of what is contained in the employment agreement about warnings. That is because the employer's action does not derive *solely* from the application or operation of the agreement. The employer is not required by the agreement to issue the warning. There is more to the employer's action than just what must be done under the agreement. In the circumstances set out in the agreement (or, as here, the policy), the employer may decide to issue a warning but it must be able to justify that decision if called on to do so under the personal grievance provisions.

[14] The second point raised by the Trust is about Mrs Greer's responsibilities as Tumuaki to ensure the Trust meets its legal obligations to clients, such as those set out in the Privacy Act 1993. It is said that only she can decide whether there has been a breach of confidentiality. However, the law on justification has always required an employer to establish substantive and procedural justification for a dismissal or a disadvantageous action. That is what the Trust must do in the present case.

Justification for the warning?

[15] The *Code of Conduct* says that *No warning shall be issued without a full investigation taking place to ensure that fair and just treatment is given to all employees at all times*. I do not accept that there was a full investigation. Ms Newcombe did not know that she might be warned when she

was spoken to about the alleged breach of confidentiality. She had no proper opportunity to explain or mitigate the situation. For example, Ms Newcombe believes that the other case worker's attitude about what Ms Newcombe had done was relevant but she had no opportunity to raise that until after the decision to give her a warning was made. I also accept that the minutes of the team leaders meeting and the manner in which Ms Newcombe was advised of the decision show pre-determination of the decision to issue a warning.

[16] Accordingly, Ms Newcombe has a personal grievance concerning the warning. I will return to the assessment of an appropriate remedy shortly.

Is the resignation a personal grievance?

[17] This type of personal grievance claim is often called a constructive dismissal. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal identified at least three types of constructive dismissals: where an employer gives the employee the choice of resigning or being fired; where the employer conducts itself with the deliberate and dominant purpose of coercing a resignation; and where a breach of duty leads the employee to resign. The present case does not concern the first category.

[18] Ms Newcombe's evidence is that, because of personal circumstances, she could not leave her job at the Trust unless she had another job to go to. At the same time, she had decided that she could not remain at the Trust, regardless of the outcome of a mediation about the warning held on 9 September 2004. A number of Mrs Greer's relations are involved in the work or governance of the Trust. Ms Newcombe felt that Trust management had adopted a hostile stance towards her, hoping she would leave.

[19] About mid August 2004, Ms Newcombe was interviewed for a new job which was offered to her on 1 September 2004. When she resigned from the Trust on 9 September, she was due to start the new job on 13 September. The new position is for fewer hours at a lower rate and (presently) no opportunity for Ms Newcombe to extend into a particular type of work that is important to her.

[20] Inevitably, Ms Newcombe's actions in challenging the warning were going to result in a change in attitude towards her on the part of at least some of the others involved in the Trust and a measure of tension in the working relationships, given the nature of the work environment. However, the evidence does not go far enough to establish that the Trust conducted itself with the deliberate and dominant purpose of coercing a resignation. There is nothing in the evidence to suggest that the relationships could not have been mended. Similarly, I find that there was no breach of duty sufficiently serious as to entitle Ms Newcombe to resign and claim constructive dismissal. The appropriate course, followed by Ms Newcombe, was to deal with her complaint about the warning through the grievance procedure by mediation and reference to the Authority if need be.

[21] For the above reasons, I reject the claim to a personal grievance arising from the termination of Ms Newcombe's employment.

Remedies

[22] The compensatable loss is the humiliation, injured feelings and lost dignity suffered as a result of the grievance about the warning. Ms Newcombe has a strong sense of grievance arising from the warning. That is apparent from the tone of her correspondence with the Trust prior to the mediation. I also accept her evidence that her confidence has been adversely affected as a result of

that experience at the Trust. An appropriate award of compensation for those effects is \$2,500.00 which I order the Trust to pay to Ms Newcombe without deduction.

[23] When an employee has a grievance but has contributed in a blameworthy way to the situation giving rise to that grievance, the Authority must reduce remedies to reflect that contribution.

[24] The information at the centre of this problem was important for the Trust's work with the client. The difficulty lay in Ms Newcombe attributing her knowledge of that information to the other case worker when the client had already complained about the case worker. Ms Newcombe had not been made privy to those details and should have been properly briefed. If she had been, she no doubt would have avoided upsetting the client. On that analysis, Ms Newcombe did not contribute in a blameworthy way to the circumstances giving rise to the grievance.

Summary

[25] Ms Newcombe has a personal grievance in respect of the warning but not the resignation.

[26] To remedy the grievance, the Trust is to pay Ms Newcombe \$2,500.00 compensation pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000.

[27] Neither party was legally represented so it is not appropriate to make any award of costs. Having been successful with a grievance, Ms Newcombe is entitled to reimbursement of her \$70.00 lodgement fee which I order the Trust to pay to her in addition to the compensation.

Philip Cheyne
Member of Employment Relations Authority