

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 228
5379132

BETWEEN PATRICK MAURICE
 O'SULLIVAN
 Applicant

A N D LITERACY TRAINING
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Patrick O'Sullivan on his own behalf
 Tim Cleary, Counsel for Respondent

Investigation Meeting: 22 May 2013 at Invercargill

Submissions Received: At the investigation meeting

Date of Determination: 7 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Patrick O'Sullivan, claims he was unjustifiably dismissed by the respondent, Literacy Training Limited (LTL), on 24 September 2009.

[2] LTL accepts it dismissed Mr O'Sullivan but contends its actions were justified.

Background

[3] Mr O'Sullivan was employed by LTL on what purports to be a two year fixed term agreement expiring on 30 June 2010. That said, the agreement contains provisions permitting earlier cessation in certain situations including misconduct. He

was engaged to deliver foundation skills programmes in literacy and numeracy to inmates at Invercargill Prison.

[4] According to Mr O’Sullivan problems first arose in early 2009 when he became concerned at what he considered the misapplication of an assessment tool (the progressions tool) introduced by the Ministry of Education. He goes on to say:

A rigid and prescriptive adherence to the progressions framework is and has been, a contentious issue in the education sector, too many prescriptive practitioners are applying it as a fail-safe environment ball test of capacity, requiring 100% achievement rather than as a tool to assess where knowledge gaps, critical to the circumstances of an individual’s need to function in society subsist. Such gaps should be evaluated and addressed in a targeted rather than a wholesale application.

[5] There then followed a further incident where LTL’s governing director, Linda Sturgess, made a significant amendment to one of Mr O’Sullivan’s student assessments. She reduced the grade from 26 to 3. At the time Mr O’Sullivan did not know who was responsible.

[6] Mr O’Sullivan, in his statement of claim, goes on to say:

Concomitant with his disquiet at the arbitrary modification of the score and the refusal of LTL management to engage on that issue, he became even more disaffected by the growing impression that LTL was being over administered and under managed. at the expense and to the detriment of proper assessment and teaching.

[7] Mr O’Sullivan took to expressing his dissatisfaction via a monthly internal feedback medium. He got a response after a couple of months but it was not one he appreciated as he felt it avoided the issues.

[8] Mr O’Sullivan gives a succinct overview of what then occurred when he says (again in the statement of claim):

This [grading] issue sparked the frission between [himself] and Ms Sturgess that developed into the contention and culmination in his dismissal over an “Exit Policy” instruction.

[9] Mr O’Sullivan accepts that once he discovered it was Ms Sturgess who had amended the grading, and having concluded she unwilling to engage over the issue, he directed criticisms at her, a substantial volume of which was presented at the

investigation. He does not, however, consider he was indiscrete or provocative. LTL has a contrary view and took a dim view of Mr O'Sullivan's various pronouncements.

[10] Mr O'Sullivan goes on to say that at the same time he was waging his personal battle with LTL there were rumblings amidst other staff. He says:

For all the plethora of reportage and administrative documentation, there was little action by LTL on anything unless it had to do with an exercise that could be immediately charged out. Arbitrary decisions about bonus payments, muddled instructions, niggardly provision of resources and a general lack of response from LTL when issues arose, led to a grand spell of disquiet.

[11] Mr O'Sullivan says he became aware of the dissatisfaction when various staff responded to advise of an *Exit Policy* Ms Sturgess sent to all employees on 4 August 2009. It concerned when a prisoner should exit the skills programme.

[12] Mr O'Sullivan describes the edict as a *patent absurdity* to which he objected. His initial objection was recorded in an all persons' response he sent to Ms Sturgess' original email. That was a medium he used for further criticism which led to a response Mr O'Sullivan portrays as remarkable. He says Ms Sturgess simply asserted her instruction was lawful and unchallengeable. Mr O'Sullivan was required to accept it or face the consequences.

[13] Mr O'Sullivan claims Ms Sturgess then issued what amounted to a gagging order. The e-mail in question states Ms Sturgess had received complaints about the content of Mr O'Sullivan's e-mails and states *This action by you will stop immediately*. It goes on to advise *If you have points of concern, raise them with me, not the other staff*.

[14] Mr O'Sullivan says a furore then erupted and staff set up what they considered a *safe network* through which they could continue the debate. Mr O'Sullivan says he took no part and let the debate continue around him though the evidence, including oral answers given during the hearing would suggest otherwise.

[15] Mr O'Sullivan accuses Ms Sturgess of seeing his observations as examples of disrespect and a personal attack upon her and that LTL response was to initiate a period of harassment over incomplete paperwork and various complaints from other staff about documents Mr O'Sullivan had posted via the computer network.

[16] While this was occurring there were also further exchanges over the exit policy.

[17] On 1 September 2009 LTL told Mr O'Sullivan he was required to attend a disciplinary meeting to address five concerns. Mr O'Sullivan says he welcomed this as an opportunity to discuss the issues but was later disappointed when Ms Sturgess did not attend in person. The meeting was conducted by the operations manager, Ms Terry Dalziel.

[18] The five issues were:

- a. An alleged failure to follow fair reasonable instructions in respect to paperwork;
- b. Continued non-compliance with company policies and in particular the exit policy;
- c. Inappropriate and disrespectful statements regarding the company and staff contained in various correspondence. Particular emphasis is made on an email dated 25 August in which Mr O'Sullivan compared LTL to *the third Reich* and criticised the management style on the grounds *boot camps are more empathetic*;
- d. Personalised attacks against the managing director in various correspondence; and
- e. Complaints from other staff regarding Mr O'Sullivan's conduct and the content of his correspondence.

[19] Mr O'Sullivan claims Ms Dalziel did nothing more than reiterate the view he had been deliberately fractious and only pretended to listen to explanations he put.

[20] Ms Dalziel disagrees. She contends she gave full and fair consideration to both Mr O'Sullivan's oral explanations and a detailed document he had proffered prior to the meeting.

[21] Having done so she concluded that dismissal was warranted and Mr O'Sullivan was advised of the decision by letter dated 24 September 2009.

Determination

[22] As already said LTL accepts it dismissed Mr O'Sullivan. In doing so it also accepts it is required to justify the dismissal.

[23] Before progressing I comment on the alleged fixed term nature of the agreement as, if it were truly fixed term, issues arise as to whether or not it can be annulled early and whether salary for the residual period is payable regardless. For two reasons I take the issue no further. First both parties ignored it and treated the agreement as if it read as an on-going one. Second, the fixed tenure would not withstand scrutiny and would undoubtedly be found unenforceable given inclusion of a clause allowing early termination for the very reason the agreement was allegedly of fixed duration – namely the withdrawal of funding by the Department of Corrections.

[24] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[25] In applying the test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[26] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially as the

elements referred to in 25 (b) to (d) have a procedural focus. They also summarise that which has long been accepted. An employer is required to put issues in its mind, allow an explanation and consider them.

[27] I conclude LTL can establish it has complied with the above requirements. The letter of 1 September clearly enunciates LTL's concerns. Add to that the previous exchanges and there can be no doubt Mr O'Sullivan was aware of LTL's views, concerns and expectation in respect to his conduct.

[28] There can also be little doubt Mr O'Sullivan was given an opportunity to respond. It was one he took though he does express disquiet at the fact Ms Dalziel took responsibility for the process and not Ms Sturgess. That is not something with which I take issue. Indeed I think it a wise precaution given Ms Sturgess was the target of strong criticism from Mr O'Sullivan and may therefore have been susceptible to accusations of bias against him.

[29] Finally, and despite Mr O'Sullivan's accusation of predetermination (which was the only procedural challenge he raised), I accept Ms Dalziel fully considered the explanations. Her evidence in this respect withstood scrutiny, indeed it went almost unchallenged.

[30] Turning to the substantive issues. In this respect Mr Cleary submits there was an unreasonable refusal instruction to carry out a directive followed by constant insubordination. That either can justify a dismissal in appropriate circumstances is well established (see for example *Poole v Horticulture & Food Research Institute of NZ Ltd* [2002] 2 ERNZ 869 and *Beesly & Hawkins v NZ Clerical Workers Union* [1991] 2 ERNZ 616).

[31] Having reviewed the considerable evidence I conclude dismissal could be justified in this instance. Mr O'Sullivan had taken issue with a couple of instructions. In particular, he formed negative views about LTL in respect to the way in which it was applying the progression tool, its alleged failure to engage on the grading change and the exit policy.

[32] Despite claims to the contrary, the evidence shows LTL did attempt to engage on these issues and the real source of Mr O'Sullivan's angst was his inability to attain the outcomes he sought. Mr O'Sullivan gave a significant amount of evidence about why his views were correct and the LTL's approach unwise.

[33] The evidence leaves me far from convinced Mr O’Sullivan is correct but, in any event, I do not have to decide the issues. An unwise commercial decision (if it indeed these were given the requirements of the client, The Department of Corrections) does not render a resulting instruction unlawful, unsafe, or unreasonable or at least did not in this case.

[34] Once a decision had been made, explained and communicated as occurred here, Mr O’Sullivan was under a duty to obey. Instead he chose to do otherwise and his evidence, along with the way it was presented, made it clear he had no intention of ever bowing to his employers instructions. As he himself put it when answering one question *an immovable object had met an irrevocable object* and the evidence also supports a conclusion he exhibited the same attitude to his employer and it was aware of that.

[35] He then aggravated the situation by embarking upon an increasingly inappropriate written campaign and failed to take notice of numerous attempts LTL made to bring its requirements to his attention and ameliorate his behaviour. In saying Mr O’Sullivan’s written assertions were inappropriate, and despite his assertions to the contrary, I simply note their content. I also note his claim he uses *analogy and illusion to make a point* and his acceptance when answering questions that the content got more acerbic and pointed as time passed.

[36] In the face of such intransigence the employer was, I find, entitled to conclude the relationship was no longer sustainable as Mr O’Sullivan was intent on impeding the operation by failing to act as required.

Conclusion

[37] For the above reasons I conclude the decision to dismiss was one a fair and reasonable employer could have reached in the circumstances. Mr O’Sullivan’s claim therefore fails.

[38] Costs are reserved.