

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 93A/09
5272393

BETWEEN DENNIS OWEN
Applicant

AND THE PUBLIC TRUST
Respondent

Member of Authority: G J Wood

Representatives: Stuart Webster for the Applicant
John Rooney for the Respondent

Investigation Meeting: 13 and 14 October 2009 at Napier

Submissions Received: By 3 November 2009

Determination: 20 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Dennis Owen, was summarily dismissed from his position as an Estate Manager with Public Trust on 29 June 2009. He claims this was unjustified, because he did not commit serious misconduct and if he had, the appropriate sanction, particularly given his more than 40 years of service, should have been a warning.

[2] Public Trust claims that Mr Owen was dismissed by his Regional Manager, Mr David Muir, for multiple breaches of various aspects of its code of conduct over a long period of time, in relation to a member of the public who laid a complaint about him. In particular, Public Trust considered that Mr Owen had seriously breached its policies over not giving investment advice unrelated to Public Trust products, contrary to the terms of his employment agreement.

[3] I have prohibited the publication of any material identifying the person who complained about Mr Owen and the steps taken by Public Trust to resolve his complaint (including the settlement), for reasons of personal privacy and commercial confidentiality. For similar reasons I have also prohibited the publication of any evidence about any reviews into the Public Trust's structure.

[4] The issues for determination are:

- Did Mr Muir have proper delegated authority to dismiss Mr Owen;
- Was Mr Muir the real decision-maker;
- Were there ulterior motives in Mr Owen's dismissal;
- Did Mr Owen have a fair opportunity to make submissions on the factors taken into account by Public Trust, such as the former Regional Manager's file note, a subsequent interview with the share broker recommended by him and prior incidents in his employment that were held against him;
- Was Mr Owen's belief that what he was doing was not wrong, properly taken into account where serious misconduct was alleged;
- Did Mr Owen's length of service and other mitigating factors mean that a warning would have been the proper result;
- If the dismissal was unjustified, what remedies should be awarded to Mr Owen?

Findings

[5] Public Trust is a statutory body set up under the Public Trust Act 2001 and is New Zealand's largest trustee organisation. It is owned by the Government and until 2008 was the only deposit taking institution that had a government guarantee. It provides the full gamut of trust and estate management services, including legal and financial advice. Its frontline staff, such as Mr Owen, are not lawyers, and investment advice can only be given by those employees who have undergone an internal

certification process. Even then they are prohibited from giving advice on investments other than those provided by the Public Trust itself.

[6] Mr Owen had been employed with Public Trust since leaving school in 1964. He was certified to give investment advice, in 1999, following his obtaining a Certificate in an Introduction to Financial Planning in 1997.

[7] Public Trust's policies about advising a consumer about investment advice, about which Mr Owen was trained and certified state, verbatim, the following:

Who can provide investment advice

Current policy will allow advice to be given only on cash held and Public Trust investment products.

Asset allocation investment advice can be provided to agency customers only by staff members specially trained in investment principles and practice. Only trained staff members are entitled to hold a disclosure statement that confirms their specific qualification to give advice. This statement is to be available to the customer at the initial interview.

Advising the customer on investment policy

Depending on the extent of the proposed duties, the customer is to be informed that asset allocation advice will be given but implementation is restricted to advising on a customer's use of current cash holdings or current investments with Public Trust investment advice can be offered on Public Trust investment products only.

Where the investment proposal involves a mix of Public Trust and other investment products, advice on the appropriateness of the other investment products cannot be given.

External investment advice will be sought on the customer's behalf from their own advisor or a financial advisor suggested by Public Trust.

Obtaining external investment advice

If a principal has an existing investment advisor and wishes that person or organisation to continue to provide investment recommendations, Public Trust is to act on the advice received. The letter of instructions is to contain specific reference to the seeking of advice and the name of the financial advisor to be employed.

When a principal has no particular financial advisor who can provide investment advice, an investment advisor with whom Public Trust has an existing relationship may be recommended. The investment advisor recommended should be an organisation which:

- *has an impeccable reputation in the investment advice industry*

- *will not alienate the customer*
- *does not attempt to take over any current or future business Public Trust may have with the customer*
- *is prepared to recommend investment in Public Trust managed funds.*

All investment advisors with whom Public Trust has a relationship are to meet these guidelines.

[8] It must have been accepted by Mr Owen that, at the very least, the same strictures applied to non-customers as customers. Indeed no informal arrangements are supposed to be entered into with people who are not customers of Public Trust. These arrangements are made because most of the frontline staff are not legally qualified or qualified in financial planning. In fact, when Public Trust gets a customer, this has to be recorded on a customer information sheet. An investor information sheet also has to be filled in, which deals with the customer's investment goals, needs, cash available for investment and sets out expected returns from certain Public Trust products. The customer has to sign off that they have received a copy of the saving and investment guide and the disclosure statement, and that they:

Confirm and acknowledge that the advice Public Trust has given is not a comprehensive financial plan and is limited to:

1. *The amount that I/we have available to invest in Public Trust, and*
2. *The advice will only offer investment in Public Trust investment funds*

[9] In Mr Owen's disclosure statement, required by law, it is stated *from time to time Dennis may also advise on the acquisition, disposition or retention of all manner of securities, including but not limited to; shares (listed and unlisted) unitised funds (Public Trust and non Public Trust), bonds, deposits, debentures, and foreign exchange cash within New Zealand and overseas.*

[10] This apparent anomaly was explained to my satisfaction by Public Trust on the basis that the definition of advice under the various Acts applying to investments is so wide that any comment on them may be seen as advice, and therefore the disclosure statement reflects that.

[11] The various Acts relating to security markets provide similar definitions as to what constitutes investment advice. In effect they provide that advice means a recommendation, opinion or guidance given to the member of the public in relation to buying or selling (or not buying or selling) securities, but does not include any such guidance about the procedure for buying and selling securities.

[12] The issue of investment advice was fundamental to Mr Owen's training in 1999 and thereafter. He was formally trained by Mr David Gordon, who is Public Trust's Project Manager Investment Advice. The first training session took two days and included both audio and audiovisual recordings of role plays involving each participant. The sessions concentrated on informing staff, amongst other things, just how wide the definition of investment advice was.

[13] I accept that the training made it clear that any sort of comment about what were or were not good or bad investments was investment advice and should not be provided, except in relation to Public Trust products, being its unit trusts and term deposits. I also accept that this involved advisers ensuring they distanced the Public Trust from any comments about products that were not its own, and avoiding the use of terms such as *I* or *we*, as Mr Owen stated. That did not, however, mean that employees were entitled to go further and make comments generally about what products other investment advisers were recommending. These issues were reinforced in an email in February 2009 to Mr Owen from Mr Gordon, which states, amongst other things:

My disclosure statement says I give advice on all sorts of securities – but I don't?

This is a standard clause we have inserted in every disclosure statement, it is comment to a customer about their existing investments (even saying something as simple as “we don't need to do anything about them at the moment”), or any comment to a settlor/co-trustee regarding realising/transferring/terminating investment assets in an estate or trust, means you could be advising on “other” securities.

[14] I conclude that the training in 1999 properly covered the issue of the extent to which the definition of *investment advice* was very wide, and that Public Trust advisers were not to give advice on anything other than Public Trust products. In 2004 Mr Owen undertook a one day refresher training course with Mr Gordon on the investment advice policy.

[15] Public Trust has a code of conduct setting out the basic principles expected to be observed by employees in its employ. Employees are required to perform their official duties honestly, faithfully and efficiently. In doing so they are required to obey the law and all lawful and reasonable instructions of their employer, and to work as directed. It also sets out guidelines for dealing with disciplinary cases, including a number of principles which must be adhered to ensure procedural fairness and natural justice. The code states:

Any Manager dealing with a disciplinary matter must be able to satisfy the Chief Executive that all these principles have been complied with before he/she approves any disciplinary action being taken.

[16] The code sets out examples of serious misconduct, although they are said to be not exhaustive. Amongst them are wilful failure or refusal to comply with employment related legal requirements, or the Public Trust code of conduct.

[17] Mr Owen accepted in evidence that he was aware that advice was only to be given to Public Trust customers and then only about Public Trust products. He was also aware that when external investment advice was sought it was to be delivered in writing in a letter of instructions. Advisers with whom Public Trust have an existing relationship could, however, be recommended. External investment advice could thus be sought on the customer's behalf from their own adviser, or a financial adviser suggested by the Public Trust, and therefore provided by that adviser, and not Public Trust.

[18] In July 2008 the Investment and Savings Ombudsman received a formal complaint from someone who believed that the Public Trust, through Mr Owen, had failed to invest his savings wisely. The complainant stated that it was devastating to be advised that all his money had been invested with high risk companies that are now in receivership, that it would appear that his funds had been badly managed and that he could not believe that an experienced fund manager would not spread his investments and limit the risk, instead of placing his entire funds with high risk finance companies. Not all of this information was entirely correct, including the fact that the complainant had made investments of his own without the involvement of Mr Owen, and that all of his savings were not at risk.

[19] Between July 2008 and May 2009 Public Trust investigated this complaint and reached a settlement with the complainant. In June it turned its attention back to

Mr Owen's role of allegedly giving investment advice to the complainant about non-Public Trust products, without the complainant being a customer. It had previously informed him at the time that there was an issue about the complainant, which may later have to be dealt with. At the same time Public Trust decided to deal with an issue about Mr Owen talking to the media in breach of its policy. It did so by way of a letter dated 15 June 2009. Mr Owen can have been under no uncertainty that dismissal was a possible option.

[20] Mr Owen was not provided with the file notes of interviews with the complainant, although there were extensive references to them in another document given to him. In particular the interview of the complainant was dealt with in one memo between paras.19 and 24 inclusive. Furthermore, Mr Owen had already been interviewed as part of the initial complaint process.

[21] Mr Owen was also referred to the code of conduct in the letter of 15 June, relating to performance of duties, which states:

Employees should carry out their duties in an efficient and competent manner and avoid behaviour which could bring discrediting on or impair effectiveness of Public Trust.

Employees are required to obey all lawful and reasonable instructions of the employer.

Avoid any financial or other interest or undertaking that could interfere with or compromise the performance of their official duties or the integrity of the Public Trust.

Employees should fulfil their obligation to Public Trust with their employer observing the highest standards of honesty and integrity and bearing in mind a special and individual relationships that the Public Trust reach with its customers.

[22] Public Trust's delegations policy provides that for dismissal below general manager level, the nominated position is the relevant general manager and the conditions for dismissal are *consult relevant GM and human resources manager. GM dismissals reserved to chief executive.* Paragraph 3.2 of the delegations advises that any person nominated as having the authority to dismiss *includes any person appointed as deputy of that holder or appointed to act in that position.* Mr Alex Polaschek, General Manager, Sales and Service, arranged for Mr Muir to conduct the disciplinary process.

[23] A disciplinary meeting was held on 22 June. At the meeting Mr Muir advised that he was the decision-maker and that dismissal was a possible option. At the investigation meeting Mr Owen made it clear that he had first come into contact with the complainant in November 2000, when he presumed that he discussed the usual options with him, namely the share market, bank deposits and the bond market. He suspected that the complainant asked only about bonds. Mr Owen had been dealing with a local broker on behalf of other clients and told the complainant that a specific investment was available and that he would send him an application form. The complainant did not take that up, but Mr Owen then apparently sent him another form for another type of finance company investment, which he collected from the broker and sent directly to the complainant. From then on he said the complainant would ring once or twice a year asking how his investment was going. Mr Owen would then ring the complainant back and inform him. On another occasion he sent him an application for another finance company, an exercise that was later repeated.

[24] Mr Owen stated that he never made the complainant a client, but the complainant was well aware that he worked for Public Trust, and he kept the complainant at arm's length because of that. Mr Owen stated that all he did was pass information on to the complainant that he got from a broker, not give advice. He also noted that on at least two occasions the complainant made investments off his own bat, without any reference to Mr Owen.

[25] In answer to a question about the word *broker*, Mr Owen stated that he would have said to the complainant to go down to a local broker if you want to invest in the particular product being suggested at that time. Mr Owen thought that he was told by the complainant that he did not know a broker, so Mr Owen told the complainant he would get the application forms and send them to him.

[26] Mr Owen also noted that the only reason that Public Trust settled with the complainant was for publicity reasons, not because of any legal liability. The point was made by Mr Owen's representative that it appeared Mr Owen was being held responsible for someone else's decision to settle with the complainant and that the nexus between the complainant and Public Trust was murky at best, and was so indicated in Public Trust's own documents. It was pointed out that it was always made clear that the complainant did not rely on Mr Owen for advice, but rather was

referred to a broker. Mr Owen made the point that there was only contact once or twice a year.

[27] There was a discussion on the complainant's allegation that Mr Owen had told him that his investments were completely safe, whereas this was not the case. Mr Owen denied that. He would have told him to go and see someone else and to try not to worry, as there was nothing he could do as the fund was frozen.

[28] When questioned about the fact that the broker had had no contact with the complainant directly, Mr Owen replied that while he sent application forms, he had only ever received one letter from the complainant.

[29] When asked whether he provided information on a non-Public Trust product, Mr Owen replied *of course that is what any advisers would do, would have to – don't you if a client comes in to discuss outside investments?* When asked why he would not provide the broker's name and let the customer go direct, Mr Owen stated he could not recall whether he ever gave the complainant the broker's name, but that he gave no advice whatsoever, and was merely an intermediary.

[30] When asked what he or Public Trust gained from such actions, he stated that he was *nurturing someone who could become an office client. That was the only reason this started up.*

[31] The discussion then turned to the issue over media contact.

[32] At the conclusion of the meeting, Mr Muir stated:

About the [name deleted] case I would like to have the opportunity to ask further questions in the future when I will arrange a time to do so if you would like Mr Webster to come as well. Is there anything further you would like to say in regard to either of these issues?

[33] On Mr Owen's behalf his representative stated that the Public Trust needed to take into account s.103A of the Act. He stated that some things Mr Owen did were ill advised and that he may well have, in hindsight, protected himself and Public Trust in a different way. He also stated, however, according to the record of the meeting:

The written response from Dennis always mentioned the broker – an important point. Dennis Owen didn't believe [name deleted] was a Public Trust client but may have been a prospect in time. Know how things work in terms of relationships. Nurture it. Maybe some of that

nurturing should have been documented. He has always said he is an intermediary and trying to help people looking at building relationship with possible Public Trust client in future and this is how this should be looked at in the future. And that is how this should be seen.

[34] Mr Muir concluded the meeting by saying that he would confirm if any further questions were required, that he was seeking advice from his General Manager, the Chief Executive and Human Resources in regard to a potential decision and that he would try and bring things to a close as soon as possible.

[35] In response to a copy of the draft minutes, Mr Owen's representative also noted that the overriding issue here was the s.103A test, that Mr Owen was a long standing employee of the Public Trust with an impeccable record, that the conduct was the first of its type and may justify a warning at most, but that dismissal could never be warranted.

[36] Mr Owen provided long dedicated service to Public Trust for more than 40 years without incident. There were, however, a number of issues raised with him in his last year or so of employment, one of which led to a warning (which was not pursued by Mr Owen as an employment relationship problem with Public Trust). Furthermore, after Mr Owen's dismissal it came to Public Trust's attention that he had ignored its relatively recent policy of storing client's property off-site, by leaving certain items of costume jewellery in envelopes in a filing cabinet, which he acknowledged.

[37] Mr Muir believed that he needed to speak to the broker directly, and did so on 25 June. While Mr Muir believed that that provided no new evidence necessitating another meeting with Mr Owen, the broker did indicate that it was possible that the complainant was simply trying to embellish matters in order to get money out of the Public Trust, particularly given that not all his statements were correct. He also informed Mr Muir that he did not believe Mr Owen had conducted himself improperly and that there was nothing improper in the relationship between himself and Mr Owen.

[38] Mr Muir went on to discuss the information he had gathered with Mr Polaschek and senior members of the human resources team. Mr Muir decided to give the benefit of the doubt to Mr Owen in that any breach of the media policy could

be considered as merely an injudicious passing comment. Contacts with the complainant, however, were categorised as serious misconduct warranting summary dismissal, because it was considered that he had:

- Failed to avoid behaviour which could bring discredit on or impact the effectiveness of Public Trust;
- Failed to obey reasonable instructions and to work as directed;
- Failed to avoid any financial or other interest or undertaking that could interfere with or compromise the performance of his duties or the integrity or standing of Public Trust; and
- Failed to fulfil his obligations in observing the highest standard of honesty and integrity, bearing in mind the special and individual relationships with Public Trust to each of its customers.

[39] In determining penalty, Public Trust looked at:

- The seriousness of the allegations;
- Mr Owen's response;
- Mr Owen's awareness of the code of conduct and investment advice policy;
- Mr Owen's level of seniority and autonomy in his role;
- The potentially serious consequences of his actions for Public Trust;
- His length of service;
- His prior work record;
- His attitude towards the allegations and his level of involvement;
- The level to which his actions had damaged the trust and confidence necessary in him; and

- The submissions he had made.

[40] An internal memo from a human resources adviser indicates that previous concerns with what was said to be Mr Owen's unsatisfactory conduct were taken into account, as was the previous Regional Manager's view that having interviewed the complainant and Mr Owen, he supported the complainant's account of events and that that he would be found to be more credible in a Court. That memo also states that it was Mr Muir's view that both allegations had been upheld and that it was his preliminary view that dismissal without notice was justified. The memo concludes by noting that Mr Polaschek would travel to Hastings to support Mr Muir delivering the decision.

[41] Following an email from Mr Polaschek, seeking his approval to proceed with the dismissal on the basis of serious misconduct, this approach was agreed to by the Chief Executive. The Chief Executive responded that he was a supporter of the recommendation and disappointed that dismissal would be necessary, given Mr Owen's long history of service. He supported it on the basis that there had been multiple incidents of a breach of the code of conduct and no acknowledgment that there is an issue of inappropriate conduct, which does not give him confidence that it would not occur in the future.

[42] Mr Owen was accordingly summonsed to a meeting on 29 July. At the commencement of that meeting Mr Muir announced that Mr Owen would be dismissed summarily. In response, Mr Owen's representative indicated that interim reinstatement would be sought immediately. Mr Polaschek mentioned that unlike the submissions made on his behalf, Mr Owen did not have an impeccable record.

[43] Public Trust offered Mr Owen the option of resigning, which was rejected. Mr Owen's representative then asked that there be a joint statement to preserve Mr Owen's reputation. No agreement was able to be obtained. Public Trust told staff that Mr Owen was currently unavailable and that no other detail or information was to be provided.

[44] Mr Owen's claim for interim reinstatement was dismissed and the matter has now been able to be investigated fully. Unfortunately the parties have been unable to resolve the employment relationship and therefore a determination from the Authority is required.

The Law

[45] In *Air New Zealand Ltd v. V* (unreported, Colgan CJ, Travis, Shaw and Couch JJ, AC15/09, 3 June 2009), at para.[37] it was made clear that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[46] In determining whether or not it was open for Public Trust to decide that Mr Owen committed serious misconduct in his employment, the Authority is not required to determine whether Mr Owen breached any legislation relating to investment advice. What is relevant is whether any breach of his duties to Public Trust as his employer was sufficiently serious to justify summary dismissal.

How Public Trust Delegated the Authority to Dismiss

[47] Public Trust's policies make it clear that the person with the authority to dismiss Mr Owen was Mr Polaschek as the relevant General Manager, unless someone else did so as his deputy or had been appointed to act in his position. Clearly Mr Muir was not acting in Mr Polaschek's position because the word acting implies continuous actions by a person undertaking actions on behalf of Mr Polaschek, albeit for a short period of time. The word *deputy* is defined in the Black's Law Dictionary, 6th ed as *a substitute, a person duly authorised by an officer to exercise some or all of the functions pertaining to the office, in the place and stead of the latter*. Mr Polaschek was the relevant general manager whose position was nominated as being the person able to dismiss staff such as Mr Owen. In this case, I am satisfied that Mr Polaschek appointed Mr Muir as his deputy for the limited purpose of conducting a disciplinary process with Mr Owen, which could always have resulted in his dismissal. There is nothing in the wording of the delegations policy that requires the appointment of a deputy in writing, or that the deputy must be appointed for all purposes, such as would be implied in the case of an acting holder of Mr Polaschek's position.

The Real Decision-maker

[48] I conclude that Mr Muir was the real decision-maker in Mr Owen's dismissal. He was the person who was accorded the role of investigating and determining the disciplinary issues by Mr Polaschek. He conducted the interviews and personally

informed Mr Owen of his decision to dismiss. Mr Muir took extensive advice from Mr Polaschek and Human Resources, who in turn sought counsel from the Chief Executive. That does not mean that, appointed as he was by Mr Polaschek to deputise for him in the case of the disciplinary investigation into Mr Owen's conduct, he was any less the decision-maker. Indeed, as noted below, such wide consultation could be seen as good practice (*X v. Auckland District Health Board* [2007] ERNZ 66 applied). It is clear from this case that consultation with a more senior or experienced officer of an employer is a sensible check, but does not mean that the person consulted is the decision-maker.

Ulterior Motives

[49] Having seen and heard Mr Muir and Mr Polaschek give evidence, I am satisfied that there were no ulterior motives in Mr Owen's dismissal. The fact that the Chief Executive put the cost of settling with the complainant on to Mr Polaschek's budget, and that in turn he required Mr Muir to meet it from his budget, is not sufficient grounds to conclude that this was a motive for the dismissal of Mr Owen.

[50] I accept that Mr Polaschek and Mr Muir were sincere in their beliefs that the reason Mr Owen was dismissed, working as they all did in a large organisation, was for a serious breach of Public Trust's policies, exposing it to financial and reputational risk, rather than as a scapegoat for the settlement entered into by Public Trust. This approach is supported by my views on whether or not Mr Owen could be seen as having committed serious misconduct. Furthermore, I have accepted the assurances of Public Trust's witnesses that Mr Muir had given the benefit of the doubt to Mr Owen over the second allegation over the media policy, despite what was stated in the HR adviser's memo.

[51] Similarly, the other ground claimed, that the Public Trust wished to save redundancy costs, has not been made out on the evidence, particularly given its speculative nature and the seriousness of such an allegation against senior officials in Public Trust, i.e. that they would seek to dismiss a worker simply to save on redundancy entitlements.

Full and Fair Opportunity to Respond and Make Submissions?

[52] In *Air New Zealand v. V* the Full Court concluded at para.[97] that as the worker had had an opportunity to comment on the employer's views on how he

should behave there was no need for it to seek further comment on the issue from the employee before reaching a conclusion.

[53] Thus where an employee is given a full opportunity to provide an explanation, that explanation should be taken into account. It would, however, be to extend the obligations on employers too far to require them to invite comment upon the employer's assessment of the employee's explanation or attitude to what had occurred (*W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448).

[54] In *ADHB* it was held at para.[157] that Dr White's dismissal was in breach of contract because it was in breach of the ADHB's delegated authority policy. Adherence by the ADHB to its relevant policies was an express condition of Dr White's contract of employment. Neither the collective employment agreement applying to Mr Owen, nor the code of conduct, provided any such contractually binding provisions as in the *ADHB* case.

[55] At para.[160] Colgan CJ noted:

The obligation to consult was a sensible condition attached to the delegation of the power to dismiss someone in the plaintiff's position. It ensured a second or at least additional consideration of an intended dismissal, by ADHB's most senior officer, unaffected by the subjectivity of the investigative process that Dr Murray himself had undertaken.

[56] This was found to be a sensible check on and balance to serious decision-making of the sort this case illustrated, and not a mere formality.

[57] I am satisfied that the minutes of the meeting held with the broker provide no additional information that required Public Trust to revert to Mr Owen for any further information, as Public Trust did not hold any concerns about his honesty over his financial dealings with the complainant.

[58] Mr Owen was not told that his previous manager thought that the complainant's version of events would be more credible than his. However, it was made clear in the material provided to him that there was more than one version of events, that the relationship between the parties was *murky* and only limited evidence existed of the interactions between the complainant, Mr Owen and the broker.

[59] This issue of credibility was addressed in the investigation meeting, if only indirectly in the sense that Mr Owen was asked to give a full explanation of events

and Mr Owen indicated that he was not going to call the complainant a liar but he would like that to be *mirrored*, and thus his own credibility should be upheld. The complainant's credibility vis-à-vis Mr Owen was also explicitly covered in the reasons for Public Trust settling with the complainant, which Mr Owen and his representative believed provided the basis for the disciplinary action against him. Mr Owen's view that he provided no investment advice to the complainant, and did not accept his version of events, was as apparent to Public Trust as it was to the Authority.

[60] I therefore accept that the issue of relative credibility was addressed, albeit that best practice would have been to provide the notes from the previous manager who appeared to prefer the complainant's version of events to Mr Owen's. In any event, I accept that Public Trust relied for its findings of serious misconduct on Mr Owen's admitted actions, as opposed to the broader issues raised by the complainant that were subject to issues of credibility.

[61] I therefore accept that, overall, the process conducted by Public Trust was fair to Mr Owen. He had the vast majority if not all of the relevant documentation and all the relevant issues were discussed with him. He had an opportunity throughout the disciplinary process to make submissions on all matters, including penalty, and did so.

Serious Misconduct?

[62] In *Chief Executive of Department of Inland Revenue v. Buchanan (No 2)* [2005] ERNZ 767, the Court of Appeal disagreed with the effect of a ruling of the Employment Court that:

...in circumstances where an employer accepts that the employee did not know the rules, the breach of the rules, no matter how fundamental, will not ordinarily amount to conduct which could lead a reasonable and fair employer to decide to dismiss.

[63] The Court of Appeal held at para.[36]:

... the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the obligations imposed on

the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[64] As in *Buchanan*, Public Trust made a concerted effort, involving a two day training course and a refresher course, to ensure that Mr Owen was made aware of his responsibilities. Having done so it was entitled to expect him to meet his contractual obligation to comply with his responsibilities as an investment adviser (*Buchanan* applied).

[65] Because Mr Owen refused to follow the procedures that he knew were important (over a long period of time), he left himself open to claims of misconduct. Furthermore, Mr Owen's ongoing dealings with the complainant left Public Trust open to the claim that it was providing investment advice. If Mr Owen had followed the proper procedures, this would never have happened.

[66] The issues for Public Trust were about the seriousness of the breach, the fundamental failure by Mr Owen to follow its rules and its long duration, which left it open to Public Trust to conclude that this was serious misconduct. The issue about the seriousness of the breach relates to substantive failures by Mr Owen to do what he knew was right in relation to the complainant. The complainant had to be a customer before information was provided to him, particularly about non-Public Trust products, which is a separate issue in itself. The idea that Mr Owen was, as he stated in the investigation meeting, cultivating the complainant as a potential customer was rightly rejected by Public Trust, because it was not told of any steps actually taken to make the complainant a customer over the course of seven or eight years. Mr Owen's explanation that he had once asked his manager to follow up the complainant, when she was relieving in Gisborne, was not given until the Authority's investigation meeting and therefore could not have been taken into account by Public Trust. It follows that Mr Owen's claim that what he was doing was not wrong is not correct in the sense that he knew he should have made the complainant a customer, or declined to deal with him and/or referred him to the broker direct. The fact is that he knew this throughout, and therefore he knew that what he was doing was not correct.

[67] Mr Owen did, however, genuinely believe that he was not providing investment advice. His explanation of applying the rules over external investment advisers who could be recommended is, however, only relevant in relation to customers, which Mr Owen knew the complainant was not. Instead the policy

provides that where a principal, i.e. a customer, has no particular financial adviser, an outside investment adviser may be recommended. Clearly any such recommendation should be of the broker and the client directed to the broker. Mr Owen, no doubt to assist the complainant and reduce the costs that he had to meet, unwisely chose instead to act as an intermediary between him and the broker.

[68] I find that it was open to Public Trust to conclude that Mr Owen was in breach of his obligation to follow the investment advice policy. While I accept that the broker recommended was one with whom Public Trust had an existing relationship, I do not accept that the policy provides for Public Trust employees relaying significant information and otherwise acting as an intermediary about important investment advice between the broker and the complainant. The complainant should have become a customer of the broker's without Mr Owen as intermediary, and Public Trust was entitled to conclude that Mr Owen either knew or should have known so. Simply because the complainant preferred to deal with Mr Owen was no excuse for him failing to follow the policy. He was employed by Public Trust and owed significant duties to it, and none to the complainant. Therefore Mr Owen made a serious error in assisting the complainant despite his obligations to protect his employer, Public Trust.

[69] I do not accept that Public Trust failed to sufficiently take account of Mr Owen's belief that what he was doing was not wrong. It simply concluded that he was clearly in breach of its policy and that this clearly exposed Public Trust to significant reputational if not financial risk (as can now be appreciated by considering recent publicity from *Consumer Magazine* following its investigations into investment advisers).

[70] Therefore Mr Owen's actions were determined by Public Trust to be a significant breach of its policy in dealing at all with a non-customer, as was open to it to do. As the result of his acting as an intermediary, it is not surprising that the complainant considered that he was dealing with Public Trust. When a person goes to an organisation such as Public Trust, he or she can expect, in the absence of clear written information to the contrary, that the advice she or he gets is advice that is, if not recommended directly by Public Trust, then the source of that advice is recommended by it.

[71] Unfortunately for Mr Owen, because the customer would only have dealt with Mr Owen because he was an employee of Public Trust, his actions resulted in the intertwining of Public Trust with the broker's recommendations. This was not only because the complainant contacted Mr Owen as an employee of Public Trust, but also because Mr Owen maintained that relationship. Furthermore, he directly involved Public Trust's name by writing to him on Public Trust letterhead, sending him material in Public Trust envelopes and sending him an application form for securities accompanied by a handwritten note from him intended to assist the complainant in applying for securities recommended by the broker.

[72] By acting as substantial intermediary, and never making the complainant a customer of Public Trust, it was clearly open to it to conclude that Mr Owen was seriously in breach of his obligations to avoid behaviour which could bring discredit on or impact the effectiveness of Public Trust failing to obey reasonable instructions and working as directed. These breaches were, I conclude, sufficiently serious and of sufficiently long duration (given Mr Owen's relatively autonomous position) for Public Trust to conclude that serious misconduct justifying summary dismissal had occurred.

Mitigating Factors

[73] Public Trust clearly considered mitigating factors before deciding to summarily dismiss Mr Owen. Had Public Trust had another meeting with Mr Owen, whereby it had set out its conclusion that summary dismissal was its preliminary view, then Mr Owen may well have had a better opportunity to make a plea in mitigation. However, I accept that Mr Owen's representative had taken the opportunity to do so beforehand, and that this had been taken into account by Public Trust. It certainly took into account the length of Mr Owen's service. However, it was entitled to conclude that Mr Owen should have known better, given his length of service, about acting in the way that he did. In this sense length of service cuts both ways (*PSA v. MAF* [1991] 3 ERNZ 1051 applied). Nevertheless, Public Trust did take into account the serious impact on Mr Owen if he was dismissed, but for the reasons outlined above, did not feel it could have trust and confidence in him any more.

[74] Mr Owen's lack of contrition over these events was a factor that could be taken into account by Public Trust in this regard, because Mr Owen continued to

argue that he had done nothing seriously wrong, yet it was clear, and he knew it, that he had made an error in not making the complainant a customer, and continuing to deal with him.

[75] Mr Owen's representative also claimed that Mr Owen had an impeccable service record. That was simply not correct, and provided the context to Mr Polaschek raising his recent problems at work at the meeting at which the dismissal was announced. Unfortunately for him, Mr Owen was subject to a current warning, which had not been challenged. It was clearly open to the Public Trust to take Mr Owen's work record (which in fact had been put into issue by his representative) into account to determine whether or not issues of misconduct might arise again. From its perspective, it simply confirmed its lack of trust and confidence in Mr Owen, who worked in a relatively autonomous fashion.

[76] It was therefore clearly open for Public Trust to conclude in all the circumstances that dismissal, rather than a final warning, was the appropriate action. An employer with a less systemised rule-based approach to its business, or even a more forbearing one, may have come to a different conclusion, but I accept Public Trust's view that in its particular situation it needs to be very vigilant about matters related to investment advice, and thus its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances. I therefore dismiss Mr Owen's personal grievance.

Costs

[77] Costs are reserved.

G J Wood
Member of the Employment Relations Authority