

Attention is drawn to paragraph 3 prohibiting publication of certain information.

Determination Number: CA 86/06
File Number: CEA 311/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Karen Peoples (Applicant)
AND Accident Compensation Corporation (Respondent)
REPRESENTATIVES Karen Peoples In person
Raewyn Gibson, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 4 April 2006
DATE OF DETERMINATION 9 June 2006

DETERMINATION OF THE AUTHORITY

Introduction

[1] Karen Peoples was employed as a Case Manager for ACC for 9 years. She was dismissed by one month's notice given on 30 January 2004. In her statement of problem lodged with the Authority in September 2005 Ms Peoples says that her dismissal was unjustified and she seeks compensation for lost remuneration and lost benefits as well as compensation for distress.

[2] ACC says that it dismissed Ms Peoples on 30 January 2004 by giving her one month's pay in lieu of notice following its conclusion that she had breached ACC's code of conduct by entering false information into *Pathway*, a computer system used by ACC as part of meeting its statutory obligations to ACC claimants.

[3] Some of the material produced during the investigation meeting included names of ACC claimants. I confirm now the order made earlier that the names of any of the ACC claimants referred to in the material before the Authority are not to be published.

[4] To resolve the problem, it is necessary to explain the nature of Ms Peoples' job, consider an issue that arose concerning stress, identify what were the allegations of misconduct and what was done by ACC to investigate them.

Karen Peoples' position

[5] Ms Peoples was party to an individual employment agreement, a copy of which she provided with the statement of problem. The agreement permits either party to terminate the employment with one month's notice. Ms Peoples also provided a copy of ACC's code of conduct. That expresses the importance of ACC employees maintaining ... *the highest standards of integrity, discretion, and ethical conduct in relation to their work duties*. It states that ...*any employee who commits a fundamental breach of their contract (or is in breach of one or more of the following basic rules of conduct) will be liable for immediate dismissal*.

[6] Case managers such as Ms Peoples are responsible for the development of individual rehabilitation plans for claimants. The IRP specifies the steps to be taken by ACC and the claimant to promote rehabilitation and provide the pathway of rehabilitation to return to either the pre-injury employment or alternative employment. ACC is responsible for developing an IRP within 13 weeks of a claim.

[7] IRPs can be relatively basic documents or may be quite extensive. They can be added to or amended by agreement between ACC and the claimant. They are developed by discussion between the case manager and the claimant either over the phone or in person but they should be documented by the case manager and signed by the claimant. The case manager must record relevant exchanges and documents in *Pathway*, ACC's computer system.

[8] During the financial year ending June 2004, all case managers had a performance plan which included a goal to achieve 90% of claimants having a *relevant IRP created, signed, maintained and recorded on pathway within 4 weeks of allocation*. That goal along with a group of similar goals had a 25% weighting in the ACC assessment process. Another goal focussed on the quality of IRPs and required evidence of the development of IRPs in accordance with ACC's processes. The IRP quality goal had a 5% weighting. Failure to meet both these goals would mean that a case manager would not meet the *achieved* standard required as part of the remuneration structure. Ms Peoples signed a document in November 2003 called *Performance Plan* that set out the details of these objectives, their measures and weightings.

Stress at Work

[9] Ms Peoples contracted glandular fever or something similar in late 2001. Ms Peoples did not go on sick leave and I accept that the level of her work output no doubt diminished because of the illness. In evidence, Ms Peoples also referred to several other issues during 2002 that contributed to a backlog of work and increasing stress experienced by her. Ms Peoples then had several days off work in May 2003, when she became angry at what she perceived as ACC's failure to respond to her stress.

[10] When Ms Peoples returned to work there was a meeting between her and her team manager. There is a memorandum dated 27 May 2003 describing the outcome of the meeting. The memo records actions to be taken by ACC and the team manager as well as by Ms Peoples. No complaint about the efficacy of these measures was made by Ms Peoples at the time.

[11] In September 2003, Ms Peoples sought a week's annual leave on the basis that she would spend that week catching up with her backlog without receiving new work. ACC declined that application. Ms Peoples then consulted her doctor who provided a medical certificate that reads *Karen Peoples was seen and examined by me on 15/9/03 and in my opinion is medically unfit for full work from 15/9/03 due to stress and anxiety levels. If not alleviated time off work will inevitably be required*. Ms Peoples gave the certificate to ACC and there followed a discussion between her

and her team manager. There is a memorandum dated 19 September 2003 that records the outcome of that discussion. Part of the outcome was an agreement by Ms Peoples for ACC to speak to the doctor. The memorandum also describes initiatives to assist Ms Peoples and sets 10 October as a review date. The initiatives could fairly be described as limited.

[12] Lois McKay was Ms Peoples' branch manager. She spoke to Ms Peoples' doctor on Friday 19 September. There was a memorandum dated 25 September 2003 from Ms McKay to Michelle Richards, an ACC HR Manager. There is no reason to doubt what it reports the doctor as saying to Ms McKay. It seems that the doctor simply accepted at face value what was being said to him by Ms Peoples and provided his medical certificate on that basis.

[13] On 10 October 2003, Ms Peoples again consulted her doctor who this time certified her as fully unfit for work from 10 October to 20 October 2003. When Ms McKay learnt of this, she phoned Ms Peoples and invited her to a meeting to discuss what was causing the stress. Ms Peoples agreed and she met with Ms McKay and Philip Riley (Ms McKay's manager) on 13 October. Ms Peoples is now critical of Mr Riley's approach to this meeting. She says that his comments were inaccurate and negative and that he had not properly familiarised himself with her history as a good performer. Ms Peoples says that ACC was more interested in blaming her than finding a solution to the problem. Ms Peoples now considers that ACC was looking for ways to dismiss her and says that Mr Riley's conduct during this meeting demonstrates that point. ACC says that the purpose of the meeting was to investigate Ms Peoples' issues and identify how it could support her. It is not necessary to resolve the differences. No complaint about ACC's conduct was raised at the time and what happened at the meeting is immaterial to the subsequent dismissal.

[14] There was agreement from the 13 October meeting for Ms Peoples to be referred to a psychiatrist for an assessment at ACC's cost. Ms McKay wrote a letter to the psychiatrist asking for a report on any diagnosis, prognosis, and any specific support that ACC could offer Ms Peoples and how any illness might impact on her work. Ms Peoples saw the psychiatrist on 7 November and a report dated 20 November 2003 was provided to her and ACC. The report refers to non-work stressors that caused a psychiatric incident two years beforehand and the lingering effect of the viral infection mentioned above as part of the background to the October stress problem. However, it states *...I could not determine a DSM IV currently... and since the crisis in October, and a change of team manager, I gather from Karen that she has overcome her backlog, and feels that she is again in charge of her workload, and is settled back into her employment. Thus I don't think any other particular interventions are appropriate or necessary at the present.*

[15] Ms Peoples is now critical of the referral to a psychiatrist who apparently has no expertise in work place stress. In evidence, Ms Peoples tendered a letter dated 10 June 2004 from the psychiatrist, in response to a letter from her that she did not produce. In the 10 June 2004 letter, the psychiatrist concedes that the comment about Ms Peoples having fully resolved the work backlog was his interpretative error. However, the concessions and comments in the June 2004 letter are immaterial to the issue for the Authority as will be explained shortly.

[16] The preceding account is for the purposes of giving context to matters referred to by Ms Peoples during a disciplinary investigation after which she was dismissed. I turn now to describing how the disciplinary investigation arose.

Genesis of disciplinary allegations

[17] Around September 2003, Jane Robertson became Ms Peoples' team manager. There is an undated memorandum written by her (respondent's document 25) that refers to her meeting with Ms Peoples on 22 October and 4 November to review Ms Peoples' backlog. It also refers to

Ms Robertson checking with Ms Peoples at least once a week about progress on dealing with the backlog. While it seems that the memorandum was probably written shortly before or after the dismissal, there is no reason to doubt that Ms Robertson actually did these things. Ms Robertson also met with Ms Peoples on 24 November 2003 for a coaching session. In preparation, Ms Robertson reviewed a small sample of Ms Peoples' cases. There is a document headed *Coaching session 24 November 2003* that sets out measures of Ms Peoples' performance against the performance plan objectives. I accept Ms Robertson's evidence that she told Ms Peoples that she needed to get valid IRPs on all her files that did not have them and that she reminded Ms Peoples of the requirement to discuss IRP content with the claimant before sending the IRP out for signing. I also accept her evidence that she told Ms Peoples that IRP signed dates should not be entered into *Pathway* unless the IRP had actually been signed. To some extent, Ms Peoples disputes Ms Robertson's evidence about their discussion. However, Ms Robertson's evidence was direct, supported by the documentation and represents the sort of discussion one would expect in the circumstances. I also accept that Ms Peoples told Ms Robertson that her stress levels were okay as is recorded in the notes.

[18] Ms Robertson was involved in what she describes as a *panel discussion* with Ms McKay and another team manager on 8 December 2003. A panel discussion involved the review of a sample of files to assess ACC's compliance with duration management requirements. By coincidence there were three of Ms Peoples' files included in the review. It became apparent during the *panel discussion* that two of those three files had invalid IRPs recorded. Ms McKay was concerned with this and spoke to her manager (Mr Riley). Mr Riley asked for Ms Peoples' entire case load to be reviewed to determine the extent of the problem. Ms Robertson was tasked with this job and her report is contained in a memorandum to Mr Riley dated 22 December 2003.

[19] Ms Peoples knew nothing of the investigation until she met with Ms McKay on 14 January 2004. At that meeting, Ms McKay told Ms Peoples that she and Mr Riley wanted to meet with her to discuss the allegation that she had breached ACC's code of conduct. Ms Peoples is critical that she had no forewarning of the purpose of the 14 January 2004 discussion. However, its purpose was to enable ACC to tell Ms Peoples face to face and to give her a letter about the intended disciplinary meeting. There was nothing inappropriate in ACC advising its intentions in this way. Any disciplinary investigation has to start somehow and ACC cannot be criticised for the arrangements in the present case. However, I do accept that Ms Peoples became anxious about her situation after the brief discussion on 14 January with Ms McKay. Ms Peoples consulted her doctor on 20 January 2004 who certified her as unfit for work. Ms Peoples requested postponement of the disciplinary meeting to allow her lawyer time to prepare and that was agreed. The meeting was rescheduled for Monday 26 January 2004 and took place at that time.

[20] Prior to the 26 January 2004 meeting Ms Peoples conducted her own review of other case managers' files in order to establish that her practice in respect of dating IRPs in *Pathway* was common place in the office. She also sent a letter dated 19 January 2004 to Ms McKay responding to some of the specifics in Ms McKay's letter, reporting on her own review and making some other general comments about the situation. I refer below in more detail to Ms Peoples' response to the disciplinary allegations.

26 January 2004 meeting

[21] Present at the meeting were Ms Peoples, her solicitor (Brad McDonald), Mr Riley and Ms McKay. Mr Riley explained that there were two types of files that caused concern. On some files, it appeared that the IRPs had been extended on *Pathway* without consultation with the claimant or a physical file had not been sent for signing. On other files, it appeared that there had been no contact concerning an IRP with the claimant but *Pathway* recorded the IRP as having been completed. Ms Peoples said in response that her practice was the same as other case managers.

Ms Peoples was asked to explain the practice and she said that it saved time and that there was a strong drive by ACC for case managers to achieve their performance goals (KPIs). There was discussion about Ms Peoples' coaching session with Ms Robertson as it related to proper practice with IRPs. Ms Peoples said that she extended IRPs to save failed statistics pending her actually meeting with claimants. ACC also referred to a discussion between Ms Robertson and Ms Peoples on 8 December 2003 and an email dated 20 November 2003 about the importance of *Pathway*. Ms Peoples was advised that investigations were underway to assess the practice of other case managers and arrangements were agreed for a further meeting for 30 January 2004.

[22] The notes of this meeting made by ACC were sent to Ms Peoples and she replied in an email dated 29 January 2004. In particular, Ms Peoples denied having said that the changes to IRPs had been to cover the KPIs.

[23] I accept that Mr Riley made the decision to dismiss but he needed to have approval for that decision from his general manager. There is a memorandum dated 27 January 2004 setting out the investigation process and Mr Riley's recommendation of dismissal. I accept it accurately summarises his view of the situation having heard Ms Peoples' explanation.

[24] Mr Riley next prepared a letter dated 30 January 2004 setting out his decision to dismiss Ms Peoples. In that letter he says:

... I have made the decision that you have breached the Code of Conduct by entering false information into Pathway. This has impacted on your own key performance indicators (KPI's) by falsely increasing your IRP completion statistics. Such KPI's go towards determining your overall performance and, by association, your salary level.

The fact that rehabilitation plans were recorded by you on Pathway as being agreed by claimants places ACC in a position where wrongful action legal proceedings could be brought against it by the affected claimants for the failure to provide the statutory entitlement of rehabilitation. If legal action were to take place, ACC would be brought into disrepute.

I have decided that your explanation is unsatisfactory and I therefore inform you that your employment with ACC is terminated effective immediately.

[25] The decision was conveyed in person to Ms Peoples on 30 January 2004. Ms Peoples was paid one month's pay in lieu of notice and other final payments on 2 February 2004.

Justification for dismissal

[26] ACC must show that the decision to dismiss was one that a fair and reasonable employer could have taken. It must show a full and fair investigation disclosed conduct capable of being regarded as serious misconduct: see *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448.

[27] ACC's investigation cannot be faulted in any significant way. Ms Peoples had a full opportunity to explain herself knowing the potential outcome. There was no predetermination and Mr Riley properly considered the things said by Ms Peoples including the few disputed points about the notes. I conclude that the investigation disclosed conduct capable of being regarded as serious misconduct. Indeed there can be no serious challenge to the conclusion that Ms Peoples entered false information into *Pathway*; that it impacted on her KPIs which go towards assessing her performance and her salary level; and that this was a serious breach of Ms Peoples' obligations to ACC in light of the potential risk.

[28] While Ms Peoples claimed not to have made the statements about KPIs, I accept the evidence of ACC that she did initially say these things at the 26 January 2004 meeting. ACC was entitled to treat that as information relevant to its decision.

[29] I find that ACC has met the test established in *W & H Newspapers Ltd v Oram*.

Disparity

[30] The Court of Appeal most recently dealt with disparity in *Chief Executive of Department of IRD v Buchanan & Symes* unreported, Chambers, O'Regan & Pankhurst JJ, 22 December 2005, CA 2/05. In that case, the Court approved the general principle enunciated in *Pacific Forum Line Ltd v NZ Merchant Service Guild IUOW* [1991] 3 ERNZ 1035 that information that comes to light after a dismissal cannot provide ex post facto justification for dismissal or a further basis for challenge to its justification. The Court also approved as an exception to that general rule the circumstances of the *Buchanan* case where disciplinary action was being taken against a number of employees at the same time so that the later treatment of one might create a disparity argument for the earlier treatment of another. There are elements of that situation in the present matter. There was an investigation into how other case managers dealt with IRPs and *Pathway* because of Ms Peoples' claim that her practice was consistent with that of others. The evidence is that no-one else was dismissed but another employee received a final warning sometime after Ms Peoples' dismissal. There is therefore some disparity of treatment.

[31] In *Buchanan*, the Court held that the Authority must consider next whether there is an adequate explanation for the disparity. The evidence of Mr Riley which I accept is that Ms Peoples' situation was viewed more seriously because of the high percentage of incidents involved, the number of incidents where there was simply no IRP at all, the recent direction to her about IRPs and her acknowledgement that it was done to meet her KPIs. I find that the disparity is adequately explained. It cannot support a challenge to the dismissal.

Summary

[32] Ms Peoples was justifiably dismissed.

[33] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority