Determination Number: AA 126A/06
File Number: AEA 778/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Christine Rogers (Applicant)
AND	Otamatea Veterinary Club Inc. trading as The Vet Centre (Respondent)
REPRESENTATIVES	Dr Christopher Perry and Ms Lynda Emmerson, Counsel for Applicant Mr Murray Broadbelt, Advocate for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
SUBMISSIONS RECEIVED	17 July and 8 August 2006
DATE OF DETERMINATION	30 August 2006

DETERMINATION OF THE AUTHORITY – No 2

Determination No 1

[1] In its determination dated 19 April 2006 the Authority held that Ms Rogers' employer, The Vet Centre, had dismissed her unjustifiably and prior to that had acted without justification and to her disadvantage. The reasons for those findings are set out in the Authority's determination given under AA 126/06.

[2] In that first determination, for the reasons given, the Authority reserved the assessment of remedies for the established grievances. It directed the parties to mediation, for them to try and reach agreement on that question.

[3] Resolution of remedies has not proved possible and the Authority is now required to give a formal determination.

Remedies sought

[4] The remedies sought by Ms Rogers in her statement of problem were;

- reinstatement

- three months' wages in lieu of notice
- damages of $12,000 for stress and humiliation
- payment of bonus due
- legal costs
- any outstanding holidays.

[5] As to reinstatement, during the investigation meeting this remedy was not pursued further by Ms Rogers. I note in the employment agreement signed on 9 May 2003 that the contractual entitlement to wages "in lieu of notice" was two weeks, not three months. Even allowing that the Employment Relations Act 2000 at s.128 does provide for a three month period for reimbursement of remuneration, the evidence of Rogers' actual loss over that period was vague. So much so that during the investigation meeting I asked her to provide better information including documentary proof of any earnings she had had in the three month post-dismissal period. The Authority has not subsequently been given that information, so I am left unable to quantify the extent of lost wages.

[6] There was a similar paucity of evidence in relation to any outstanding holidays. A contractual foundation existed for the payment of an annual bonus, and Ms Rogers said that she had received $700 or $800 on that account, but the evidence went no further. In relation to costs, depending on the outcome of this investigation it may become relevant that Ms Rogers was legally aided.

Contributory behaviour

[7] In making any final determination as to remedies, the Authority is required by s.124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. The Authority is required to reduce the remedies that would otherwise have been awarded, if the nature and degree of the employee's actions compel that adjustment.

[8] For the employee's actions to amount to contributory behaviour under s.124, those actions must constitute blameworthy conduct. There must also be a causal connection between them and the grievance, being in this case one of unjustified dismissal and another of unjustified disadvantage of Ms Rogers by the Vet Centre.

[9] For consideration as contributory behaviour must fall Ms Rogers' conduct in relation to the payment of her staff account for the vaccination of her puppies. Also to be considered is her response to her employer's efforts to resolve that issue.

[10] I find on balance from the evidence that Ms Rogers did not pay the account rendered for the work on her animals, despite being requested to by her employer. I have already given my findings in relation to the evidence on the one hand of Ms Rogers, and on the other of Ms Logue and Ms Fraser, the office personnel to whom Ms Rogers claimed she had made the payment. I

have preferred the evidence of the latter two witnesses that they did not collect or receive any payment for the veterinary services that had been provided to Ms Rogers.

[11] Mr Goodall was naturally concerned that a staff account may not have been paid, particularly after a request for payment had been made to Ms Rogers , but I consider that he was probably even more concerned about the comments Ms Rogers had made to him and others about whether she had paid or not.

[12] I find that when Ms Rogers told Mr Goodall that she had made the payment, she well knew that she had not paid. I find that this explanation to Mr Goodall was untrue and she knew it. She gave three inconsistent statements, which Mr Goodall either heard or was told about before he decided to dismiss Ms Rogers. The content of those statements rules out any possibility that she had simply been forgetful or made an innocent mistake about the payments, but had not set out to deliberately avoid paying or mislead Mr Goodall about that.

[13] Conduct such as this by an employee is undoubtedly blameworthy and capable of attracting disciplinary consequences, including dismissal.

[14] I find there is a clear link between the blameworthy conduct and the dismissal of Ms Rogers. Mr Goodall responded to Ms Rogers' inconsistent explanations by commencing disciplinary proceedings, which in turn led ultimately to her dismissal. The dismissal was unjustified because Mr Goodall displayed bias towards Ms Rogers in the letter he wrote to her and, as I have previously found, he was so affected by her inconsistent explanations that he became actually biased.

<u>The approach of the Court of Appeal to remedies, as taken in *Nutter* and in *Ioane*</u>

[15] Another way of approaching remedies in this case is to assess them in the light of all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. This approach has been approved of by the Court of Appeal in *Telecom New Zealand Limited v. Nutter* [2004] 1 ERNZ 315, at para [81] in particular.

[16] In a similar vein, in *Ioane v Waitakere City Council* CA 21/03 [9 September 2004] when considering the fixing of compensation payable to a successful grievant the Court of Appeal observed, at para [24];

> *If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's "unfair" process was not causative of any significant loss of remuneration.*

[17] As to whether bias on the part of the employer goes to substance or to procedure in a disciplinary investigation, the Employment Court has viewed it as a matter of procedural fairness. In *NZ Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35, the Court held, at page 46 of the judgment, that the minimum requirements of procedural fairness included an "unbiased consideration of the worker's explanation."

Determination of remedies

[18] I have reached the conclusion that objectively an employer acting fairly and reasonably, that is in particular by remaining impartial and free of predetermination, and also acting with knowledge of the various contradictory statements Ms Rogers had made, would in all probability still have been dismissed Ms Rogers, although it is possible that the dismissal would have been on notice rather than in summary form.

[19] Ms Rogers contribution was at a high level because by her conduct she clearly demonstrated to her employer an attitude of complete disregard towards the trust and confidence that was supposed to tie her to The Vet Centre, a bond that the parties were obliged not to break or damage. To say, as I accept she did, "they'll have to prove that I had the pups vaccinated" or similar words, indicates a high level of disrespect for her employer and its property. I accept that had Mr Goodall not pre-determined the existence of misconduct on the part of Ms Rogers he would probably still have found her to have breached trust and confidence through her conduct which he was then fully aware of. I consider that what I said about this at para [24] of the first determination overstated the situation.

[20] I therefore find that the only loss attributable to the unjustified action and unjustified dismissal was the loss of two weeks wages as an entitlement under the employment agreement. Ms Rogers conduct would not have been rewarded with a bonus. A small award only, two weeks wages, satisfies the requirements of the Act in relation to the assessment of contribution and also the actual loss suffered by Ms Rogers.

[21] I will leave the calculation of the exact amount to the parties, but leave is reserved to seek any further orders necessary to finalise the payment due.

Costs

[22] As it seems likely that the parties will be unable to resolve the question of costs themselves, I leave it open for an application to be made in the usual way by either or both parties, asking the Authority to fix costs.

[23] During the investigation meeting I was critical of the failure of Ms Emmerson to attend the hearing and give her evidence in person, as had been expected of her. Having first acted as solicitor for Ms Rogers, to avoid a conflict she stepped out of that role to become a witness. Mr Stuart Henderson was then notified to the Authority as counsel. Ms Emmerson did provide evidence, although it was in the form of a sworn statement. On the day of the investigation meeting she and Mr Henderson apparently considered they had more important matters to deal with than Ms Rogers' case. Instead of them Dr Perry appeared.

[24] The Authority is concerned at the merry-go-round of counsel acting or purporting to act for the legally aided applicant; Mr Henderson, Dr Perry and Ms Emmerson. It must also be pointed out that the rules of legal professional conduct do not permit a practitioner who has been a witness to later step back into the role of counsel, as Ms Emmerson has purported to do by filing closing submissions as "counsel." The rules apply equally where affidavit evidence has previously been tendered.

A Dumbleton
Member of Employment Relations Authority