

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 57  
3029622

BETWEEN

AMY SKEEN  
Applicant

A N D

NGATI AWA SOCIAL AND  
HEALTH SERVICES TRUST  
Respondent

Member of Authority: T G Tetitaha

Representatives: L Hemi, Counsel for the Applicant  
J Burley/K O'Halloran, Counsel for the Respondent

Investigation Meeting: 29 November 2018

Submissions Received: 6 and 13 December 2018 from Applicant  
6 and 13 December 2018 from Respondent

Date of Determination: 7 February 2019

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Ms Skeen was disadvantaged in her employment by the oral warning.**
- B. Ms Skeen was not disadvantaged in her employment by the written warning. This personal grievance is dismissed.**
- C. NASH's actions did not breach the duty of good faith. This action is dismissed.**
- D. Ms Skeen was not constructively and unjustifiably dismissed. This personal grievance is dismissed.**
- E. I order Ngati Awa Social Health Services Trust to pay Amy Skeen the sum of \$6,000 compensation.**
- F. I order Ngati Awa Social Health Services Trust to pay Amy Skeen \$2,250 contribution towards her legal costs.**

## **Employment relationship problem**

[1] Amy Skeen alleges she was unfairly treated during her employment. She resigned on 8 February 2018. She submits she was constructively and unjustifiably dismissed and/or disadvantaged.

[2] Te Tohu o Te Ora o Ngati Awa also known as the Ngati Awa Social and Health Services Trust (NASH) denies any unfair treatment or breach of any duty to Ms Skeen. It says she resigned and was not constructively dismissed.

## **Relevant Facts**

[3] NASH is a charitable trust based in Whakatane providing a range of social and health services to Māori within the rohe of Ngati Awa.

[4] Ms Skeen was employed as an executive assistant on 10 November 2014, initially for a 12 month fixed term. Her fixed term employment agreement included a confidentiality clause that required she “maintain the confidentiality of the employer’s business information” and that she observe the employers rules and policies.<sup>1</sup>

[5] Ms Skeen signed her position description that required a “high degree of confidentiality and discretion to be practised at all times”. She also signed a “Declaration of confidentiality” that required, amongst other things:

You shall not disclose to any person, either during your employment or association with or as a result of an investigation project with the Service or at any time thereafter, any official information which has come to your knowledge in the course of an investigation, except according to law or where that information is of a class the Service is not obliged to nor would keep confidential.

[6] At the material time, NASH had a disciplinary policy. This provided for oral warnings and written warnings for unsatisfactory performance and misconduct. These could lead to termination of employment.

[7] Ms Skeen’s employment became permanent following a restructuring in 2016. A new CEO position was also established and Enid Ratahi-Pryor was appointed to the role. Ms Skeen then reported to Ms Ratahi-Pryor.

## **Verbal Warning**

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<sup>1</sup> Clauses 27 and 41 Individual Employment Agreement.

[8] In April 2017 an issue arose about payment of staff salaries. Four employees had not been paid due to an error in the bank information inputted into the payroll system by a third party. Ms Skeen had been responsible for managing NASH's transition to a new payroll system.

[9] All of the affected employees were paid by way of a cash cheque. However one employee (A) had funds deposited into the wrong bank account. The bank account was in overdraft. A contacted her bank to arrange for payment of the surplus funds back to NASH. The bank repaid the funds less the amount of the overdraft.

[10] A was distressed because she had personal obligations and could not easily afford to repay the overdraft amount. She approached Ms Skeen and they discussed repayment. Shortly thereafter A filled in a form authorising the deduction of \$20 per week from her salary to pay the outstanding amount taken for the bank overdraft. There is a dispute about whether Ms Skeen authorised A's repayment by salary deduction. A believes she did. Ms Skeen states she did not.

[11] On 19 April 2017 A's deduction form was presented to Ms Ratahi-Pryor for signing. Upon checking with A's manager, she was advised he had not authorised any repayment by deduction. She became concerned that another employee had acted without authorisation.

[12] She called Ms Skeen and Luana Morgan, Senior Finance Administrator, to her office. She told both employees they had no authority to authorise deductions by employees. Ms Morgan advised she had been on leave at the time the incident occurred. She received no disciplinary action.

[13] Ms Ratahi-Pryor alleges she subsequently issued Ms Skeen with a verbal warning. Ms Skeen believed she received a "telling off" not a warning.

### **Written warning**

[14] During December 2017/January 2018 both Ms Ratahi-Pryor and Ms Skeen were out of the workplace due to personal bereavements and other issues. Both continued to work remotely with Ms Skeen working from home.

[15] Ms Skeen received an email from the New Zealand Police on 15 January 2018 inquiring whether an employee (B) was still employed by NASH. This employee had

been the perpetrator in a serious criminal offence. The release of information about B was considered sensitive.

[16] Ms Skeen advised the Police that same day that B was no longer employed by NASH and the last day of employment was 21 December 2017. She copied Ms Ratahi-Pryor into the email.

[17] Ms Ratahi-Pryor became concerned because she believed B was still employed. She emailed the same day asking why Ms Skeen had told the Police this person was no longer employed. She wanted to know if B had been dismissed or resigned. Ms Skeen emailed later that day apologising for her “bad assumption” and asked if she should confirm B still had “an active contract but not in service.”

[18] On 16 January 2018 Ms Ratahi-Pryor emailed Ms Skeen advising her response to the Police was inappropriate and she had not been in a position to give it. She referred to previous advice to Ms Skeen not to “overstep decision-making”. She then concluded with the following:

This is a written and final warning. You are not to assume or make management decisions that are not within your employment description.

[19] Ms Skeen replied the same day that she had believed B was a casual employee with “no obligation to re-engage”. She accepted she should have forwarded this request to Ms Ratahi-Pryor and apologised for her error in judgment. She then stated:

In regards my final warning I don't believe there has been a fair process to this as I have never had any warnings during my three years employed. I have always acted in good faith to NASH and you as my manager and CEO. To be honest I am quite hurt that you have taken it so far so quickly, however I will accept it and consult with my lawyer as to my situation.

### **Further employment issues**

[20] Ms Skeen returned to the workplace soon thereafter. Ms Ratahi-Pryor continued working remotely.

[21] On 24 January 2018 Ms Skeen received a call from an ACC employee requesting an employee's bank account, tax code and IRD numbers. This employee

(C) had been the victim of a serious crime. Ms Ratahi-Pryor had received enquiries about contact details for C from the perpetrators whanau. She was keen to ensure no information was released without her permission.

[22] That same day Ms Skeen emailed the C's bank account, tax code and IRD numbers to the wrong email address and without C's authority.

[23] Ms Ratahi-Pryor became aware of Ms Skeen's email later that day. She emailed advising Ms Skeen it was inappropriate to send confidential emails with staff details based on a phone call. She asked that in future no confidential information was to be released by Ms Skeen to anyone without her approval. She wished to talk about it the next day.

[24] Later that evening Ms Skeen emailed advising that requests for information had been received over the phone from outside agencies previously and provided directly to the government email address. She denied any direction from Ms Ratahi-Pryor to handle this differently. She now believed she was being mistreated. She declined to attend a meeting the next day until she had representation. She sought the following day off to seek legal advice.

[25] The following day (25 January) Ms Ratahi-Pryor emailed requiring Ms Skeen to attend her offices. She noted the direction was not a disciplinary matter. She also wished to make sure her expectations were clear about confidential information processes and policies. She included a note that failure to respond to a reasonable directive to meet "will not be taken lightly".

[26] At 9:25 a.m. Ms Skeen replied stating that she wanted to reschedule the meeting so she could seek support. Ms Ratahi-Pryor replied asking if she was at work.

[27] It appears Ms Skeen was not at work. This is because by 11:58 a.m. Ms Skeen's lawyer replied directly to Ms Ratahi-Pryor. He advised Ms Skeen was "very upset" due to work developments and external pressures. He believed it was inappropriate to meet until these were resolved and sought a meeting towards the end of the week and asked that Ms Ratahi-Pryor call him to discuss her absence from work.

[28] The same day Ms Skeen provided a medical certificate confirming she was unfit to return to work until 8 February 2018.

### **File note**

[29] Ms Ratahi-Pryor continued speaking with Ms Skeen's lawyer. He asked that she forward copies of the employment agreement and any other relevant documentation.

[30] Ms Ratahi-Pryor sent a letter and a typed file note to Ms Skeen's lawyer on or about 30 January 2018. The letter referred to a previous verbal warning and written warning. It also set out the issues she wanted to discuss at a meeting regarding breaches of NASH policies amongst other things. Ms Ratahi-Pryor accepted that the process leading to the written warning was wrong but the issues she had raised were not. The file note purported to be a record of the meeting where Ms Skeen was given a verbal warning.

[31] At some stage Ms Ratahi-Pryor spoke to Ms Skeen's lawyer and advised that she would retract the warning. The parties then arranged to meet on 8 February 2018.

[32] Meanwhile Ms Skeen became suspicious about the authenticity of the file note. She paid an expert to investigate the date the file note was created. Her investigator reported that the file note had only been created the day prior to its receipt (7 February 2018) not 19 April 2017 when the meeting had occurred.

### **Resignation**

[33] Following receipt of that advice, Ms Skeen declined to meet. Instead her lawyer sent a letter on 8 February 2018 advising Ms Skeen resigned and raising a personal grievance in respect of the verbal warning, written warning and other issues. He confirmed Ms Skeen would not be returning to work and that she had been constructively and unjustifiably dismissed.

[34] The parties were unable to resolve their differences. A statement of problem was filed on 11 May 2018.

### **Issues**

[35] The issues for determination have been dealt with in the following order:

- (a) Was the applicant unjustifiably disadvantaged by the:
- (i) Verbal warning?
  - (ii) Written warning?
- (b) Was there a breach of good faith by deceptive conduct around production of a false record of a meeting on 3 April to support the verbal warning?
- (c) Was the applicant constructively and unjustifiably dismissed?
- (d) What remedies should be awarded?

### **Disciplinary Policy**

[36] NASH's disciplinary policy provides for oral or verbal warnings to be issued in circumstances of unsatisfactory performance and misconduct only:

**Unsatisfactory Performance:** Where it is considered improvement is required in an employee's performance or conduct at work. The employee will be interviewed and a clear indication of what is considered unsatisfactory will be given, and the employee's views will be sought. The action required to rectify will be determined and time given to do this, and an oral warning given if that is required. A written record of the interview will be kept on the employees staff file.

If satisfactory improvement within the given time does not happen then a second interview will be held. The employee will be given a written warning that refers to the previous oral warning which also says, dismissal without further notice may follow if sufficient improvement is not achieved within a further specified period. The employee will be asked to co-sign this.

At the conclusion of the second specified period, if it is assessed sufficient improvement has not taken place, the employee's services may be terminated.

**Misconduct:** Examples of what may be considered as Misconduct follow, but this is not exhaustive:

- Misuse of the organisations or clients property
- Wasting time or materials
- Failure to complete the stipulated hours of work
- Behaving irresponsibly, affecting quality or safety

Where Misconduct is considered to have taken place, the employee will be interviewed, their view sought, and if Misconduct is upheld, an oral warning will be given. A written record of that interview will be kept on the employees staff file.

If the same or a similar event occurs then a second interview will be held where the employee will be given a written warning that refers to the previous oral warning which will also say, dismissal without further notice may follow, if sufficient improvement is not evident. The employee will be asked to sign this. Immediate dismissal may follow for a further breach of Misconduct.

[37] According to the policy an oral or verbal warning is a type of disciplinary action that could (if repeated or insufficient improvement) have led to Ms Skeen's dismissal. The policy set out the process to be followed prior to any warning being issued.

## **Law**

[38] Section 4(1A) of the Employment Relations Act 2000 (Act) also sets out the requirements for employers proposing to take adverse action in respect of an employees employment. They are required to give the employee access to information relevant to the continuation of the employment and an opportunity to comment on the same information to their employer before the decision is made. Adverse action would include any form of disciplinary action such as warnings.

[39] The same adverse action may also give rise to a personal grievance. Section 103A of the Employment Relations Act 2000 requires employers to prove whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time. Having regard to the resources available, the employer must prove it sufficiently investigated the allegations, raised the concerns with the employee, give the employee a reasonable opportunity to respond and genuinely consider the employee's explanation prior to dismissal or taking disadvantaging action such as warnings.

[40] Even if the process leading to dismissal was defective, if those defects were minor and did not cause unfairness to the employee, the personal grievance may still be dismissed.<sup>2</sup>

## **Was the verbal warning an unjustified action?**

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<sup>2</sup> Section 103A(5) Employment Relations Act 2000.

[41] There is a factual dispute about whether a verbal warning was in fact administered to Ms Skeen.

[42] NASH's disciplinary policy provides for oral warnings to be given for misconduct or poor performance. Ms Ratahi-Pryor's evidence did not clarify what the verbal warning was being administered was for. When asked at hearing if the verbal warning was intended to affect Ms Skeen's employment, she stated "it was not intended to" and she would "just have put it on her file". This gave the impression this action was meant to be performance criticism as opposed to a disciplinary matter. This is consistent with Ms Skeen and Ms Morgan's evidence that they received a "telling off".

[43] Even if NASH intended issuing a warning the process leading to it was defective. The concerns were raised on the same day and at the same meeting where the warning was issued. This gave no opportunity for Ms Skeen to seek advice or support and provide any response to the concerns including the possibility of any warning or other disciplinary outcome. NASH cannot have taken her responses into account. This process did not meet the statutory requirements of s103A.

[44] The evidence about whether there was misconduct warranting a warning was equivocal. Ms Ratahi-Pryor produced her contemporaneous handwritten note regarding the meeting that stated "Amy discussed with [A] \$20 p/wk deduct" without identified who said this. Ms Skeen admitted under examination that A asked her about repayment and she said "it was Edith's call" while A stated the deduction arrangement had been authorised by Ms Skeen on behalf of Ms Ratahi-Pryor. This evidence may indicate Ms Skeen and A's mistaken belief about their conversation. It does not necessarily lead to the conclusion of any wrong doing.

[45] These procedural defects were not minor and did cause unfairness. Ms Skeen was disadvantaged in her employment by the oral warning.

### **Was the written warning an unjustified action?**

[46] Ms Skeen accepts Ms Ratahi-Pryor had intended to withdraw the written warning but failed to do so immediately which was unreasonable and unfair.

[47] It is accepted the written warning was issued without following the prior statutory process set out in s103A of the Act.

[48] However I have concluded this defect was minor and did not cause unfairness to Ms Skeen. Ms Ratahi-Pryor confirmed that the written warning was to be withdrawn, but that it arose from larger issues regarding the release of confidential information. This had occurred on two occasions and she anticipated withdrawing the warning and speaking to Ms Skeen directly about these concerns at their meeting arranged for 8 February. The concerns about the release of confidential information to third parties were justified in the circumstances, especially the release of C's private information. Instead of meeting Ms Skeen tendered her resignation in the knowledge the written warning was going to be withdrawn.

[49] In these circumstances, Ms Skeen was not disadvantaged in her employment by the written warning. This personal grievance is dismissed.

**Was there a breach of good faith by deceptive conduct around production of a false record of a meeting on 3 April to support the verbal warning?**

[50] There is little dispute the file note contains errors. NASH accepts the date of its creation (3 April) is wrong and that Ms Morgan was not being present when the verbal warning was issued. However other parts of the file note were accepted as being correct and other parts were in dispute.

[51] The admitted error about the date of creation should have been obvious to anyone with knowledge of the meeting. The meeting occurred on 19 April. The date of creation on the file note was 3 April. Ms Morgan's absence was able to be confirmed by speaking to her and the error admitted immediately.

[52] The remainder of the file note was not greatly in dispute. There were two notable exceptions namely Ms Skeen agreeing with A to repay at \$20 per week and Ms Ratahi-Pryor advising "this is a verbal warning".

[53] A file note may be erroneous in part, but this does not of itself prove it was a deceptive and false record. Further parties may dispute the accuracy of Ms Ratahi-Pryors recall but this does not mean the file note was intended to mislead or deceive.

[54] While it may have helped to have Ms Ratahi-Pryor explain at the time the file note was drafted 9 months after the event from her contemporaneous but brief handwritten notes, this does not in my view prove any intent to deceive.

[55] Further enquiries by Ms Skeen should have been made about the file note's date of creation and any disputed facts therein before resignation. Ms Skeen had a lawyer who was capable of undertaking the necessary enquiries on her behalf at the time. She is also required to be active and constructive in maintaining the employment relationship.

[56] If both parties had been responsive and communicative, these matters may not have come before the Authority and the employment relationship may have continued.

[57] There is insufficient evidence to show any intent to mislead or deceive by NASH. NASH's actions did not breach the duty of good faith. This action is dismissed.

### **Was Ms Skeen constructively and unjustifiably dismissal**

[58] Constructive dismissal includes cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer causes an employee to resign.<sup>3</sup> The resignation must be reasonably foreseeable. The onus is upon the employee to prove a constructive dismissal has occurred.

[59] Ms Skeen submits there has been a breach of an implied duty not to act in a manner calculated to destroy or seriously damage the employment relationship. Ms Skeen submits there were 'cumulative events' and (at least) two of these events could have resulted in her constructive and unjustified dismissal. These two events were the final written warning and the circumstances surrounding the issuing of the verbal warning.

[60] While the verbal warning may have been disadvantageous, I do not accept Ms Skeen's concerns about the authenticity of the file note constituted a "last straw" breach of duty by NASH that justified her resignation. I have also dismissed the actions relating to the written warning and breach of duty pertaining to the file note.

[61] Ms Skeen did not inform NASH of her concerns regarding the authenticity of the file note prior to resignation. NASH could not have foreseen her resignation

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<sup>3</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

because it expected there would be a meeting to withdraw the written warning and discuss the parties concerns about the release of confidential information.

[62] Ms Skeen was not constructively and unjustifiably dismissed. This personal grievance is dismissed.

### **Remedies**

[63] Ms Skeen has a personal grievance of unjustified disadvantage pertaining to the oral warning. She seeks compensation for hurt and humiliation. These remedies may be reduced for contributory conduct.

[64] There is evidence of loss by Ms Skeen. Her departure from the organisation left her feeling empty and anxious. She was unable to have a farewell or poroporoaki. She has also lost confidence and believes her professional reputation was damaged. She feels unable to continue friendships with her former colleagues.

[65] I would place Ms Skeen's losses on the lower end of the spectrum. This is because she did not require any medical assistance following her departure and there is little or no evidence of actual reputational damage as opposed to her perception this had occurred. Her loss of collegial friendships from her former workplace is difficult to attribute to any action by NASH given she resigned.

[66] Recent Authority cases involving unjustified disadvantage have awarded from \$6,000 to \$7,000<sup>4</sup>. Compensation for this case sits at \$6,000.

[67] There was no behaviour that contributed towards the personal grievance pertaining to the verbal warning.

[68] In the circumstances I order Ngati Awa Social Health Services Trust to pay Amy Skeen the sum of \$6,000 compensation.

### **Costs**

[69] This matter was completed within one day's hearing time. The starting point is the usual daily cost tariff in the Authority of \$4,500. Ms Skeen was only partially

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<sup>4</sup> *Hope v Hose and Engineering Supplies (Tauranga) Ltd* [2018] NZERA Auckland 384; *Smith v Falcon Building Solutions Ltd* [2018] NZERA Auckland 322.

successful. In the circumstances I intend reducing her costs award by half to reflect this.

[70] I order Ngati Awa Social Health Services Trust to pay Amy Skeen \$2,250 contribution towards her legal costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**