

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 40/10  
5158392

BETWEEN

MARGARET SMITH  
Applicant

AND

LIFE TO THE MAX  
HOROWHENUA TRUST  
Respondent

Member of Authority: P R Stapp

Representatives: Geoff O'Sullivan and Nikkii Flint for Applicant  
Yvonne Summers for Respondent

Investigation Meeting: 19 November 2009

Submissions received by: 23 December 2009

Determination: 26 February 2010

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Margaret Smith has lodged an employment relationship problem about the way her employment ended. She claimed that a suspension from work on pay was without any warning and consultation, unjustified. She also claimed that a warning given to her has to be viewed in light of her employer's failure to investigate her complaints and caused her to leave and not return to work. She says that she complained about her team leader's behaviour towards her that included intimidation, bullying and hostility. She says that her team leader was critical of her and micro managed her work, and as such she had cause to be concerned about her safety at work. She also says her team leader used abusive, sexual and derogatory language and he sexually harassed her causing her stress.

[2] The Trust has denied Ms Smith's claims. It claims its actions were justified, fair and that Ms Smith abandoned her employment.

[3] The parties have been to mediation and now it falls to the Authority to make a determination.

### **Issues**

[4] Was Ms Smith's suspension from work on full pay, including being warned, justified? Was she treated fairly? Has she been disadvantaged because of the suspension and warning?

[5] Some of the facts in this matter will evolve around the applicant's allegations about her team leader's behaviour, which he has denied, and the timing of the applicant raising such complaints. Also at issue between the parties are various matters associated with the applicant's performance in her work and the respondent's attempts to deal with these. I will deal with these as I need to.

[6] Were Ms Smith's complaints investigated?

[7] How did Ms Smith's employment end? Was there a dismissal? Did she abandon her employment? Were there foreseeable reasons for Ms Smith not to return to work?

### **The law**

[8] The law on warnings and suspensions require the employer to comply with the terms of any procedure under an employment agreement and to act fairly. They are actions open to scrutiny. Section 103A of the Employment Relations Act also applies.

[9] On ending employment the Court of Appeal commented in *E N Ramsbottom v Chambers* [2000] ERNZ 102:

[21] *An employment contract may terminate in a variety of ways apart from dismissal. Thus it may end through the relinquishment of the employment by the employee. The employer here believed that the employee had abandoned*

*the employment. “Abandoned” in its ordinary dictionary sense simply means “to give up”. Whether in an employment abandonment constitutes misconduct and so a breach of contract, or whether it is an allowed means of ending the contract, depends on the express or implied terms of the particular contract. In some circumstances it may be an agreed informal mode of immediate resignation.*

[10] In the above case a reference was also made to *Pitolua v Auckland C C Abattoir* [1992] 1 ERNZ; [1992] 1 NZLR 6 (CA): the Court said: “concerning the termination of employment by an employee who is absent for a specified time without notification to the employer”:

*“[A]n employer does have an obligation to make an inquiry where it appears that an employee may have abandoned his/her employment. The main reason for this is that if there is no specified agreed terms upon which the parties can rely then both parties should be able to expect a minimum of fair treatment.”*”

[11] His Honour Judge Travis has added in *Lwin v Honest International Co Ltd* [2003] 1 ERNZ 387 that an implied term is not prevented where there is no express term “...to give business efficacy to a contract, that if the employee abandons his or her employment, that will bring it to an end”. He also went on to say that the Court of Appeal had noted: “...where the issue is whether the employee has abandoned the employment, the employer should be cautious in drawing the inference and must face a high threshold if contending that the employment ended on the employee’s initiative in that way”. It observed “clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make enquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment”

### **The facts**

[12] Ms Smith was employed by the Trust as an early intervention alcohol and drug counsellor educator. She commenced work for the Trust on 11 February 2008. The parties had an employment agreement and there was a comprehensive job description.

[13] The Trust is a charitable organisation. It provides a service to families at risk in the Horowhenua district. This involves providing information and education to schools particularly in relation to drug and alcohol abuse.

[14] Problems started to occur in the employment relationship from September 2008, despite Ms Smith's good work. There were work issues of a professional nature and the amount of her work load. Her team leader, an officer on secondment from the New Zealand Police, embarked on managing the issues and in particular to ensure that Ms Smith operated within the boundaries that the Trust required. The secondment of the Police officer involved the Trust having the use of a Police van. There were tensions in the workplace that culminated in some difficult meetings. The first on 5 March involved a complaint from two staff members about Ms Smith being abusive. The second meeting on 17 March involved Ms Smith becoming upset in regard to an issue that was raised about her giving gifts to a client. On 18 March there was a heated discussion between Ms Smith and her team leader; they dispute what happened. Witnesses have different versions about what happened during that discussion, and whether it was Ms Smith or the team leader who was yelling at the other.

[15] The team leader says he tried to organise 4 meetings: on 27 February 2009 and on 6, 20 and 27 March 2009 with Ms Smith to deal with the issues he had with her. She says she attended on 27 February 2009. She was sick on 6 March 2009. She met with him on 18 March where they had a discussion rather than a meeting with any purpose, and at which she said she was yelled at, and that this was overheard outside the office. She did not wish to meet with him on 27 March and no meeting took place. In a hope that Ms Smith would attend a meeting the members of the Trust's Management Committee obtained advice, and a notice of suspension was drawn up and it was given to Ms Smith. She was suspended on full pay on 27 March 2009. In a separate letter a number of allegations about serious misconduct were raised. The allegations were:

- (1) The development of personal relationships with clients. This involved a client in a residential treatment facility for alcohol and drugs.

- (2) Breaking ethical rules of professional associations. This related to the contact and giving gifts to the above client.
- (3) Unprofessional conduct. This related to Ms Smith's alleged verbal abuse of two co-workers and her team leader in the office over the introduction of a new file system developed by the senior social worker.
- (4) Not following policies and procedures. This involved an allegation that Ms Smith had worked with a young person without a referral, and where previously Ms Smith's attention had been drawn to the requirements to work within the policies and procedures working with clients.
- (5) Insubordination by not providing performance appraisal information as requested. This referred to the repeated requests to meet and return a performance appraisal form.

[16] A week later, on 2 April 2009, Ms Smith made her accusations of abuse and bullying in general terms.

[17] A disciplinary meeting took place on 3 April and Ms Smith was represented by her lawyer. Nothing was resolved at this meeting and the suspension continued.

[18] Details of Ms Smith's allegations were provided on 6 April. On 16 April the Trustees further wrote to Ms Smith with an outline of its allegations for a disciplinary investigation and did not address her complaints about the team leader.

[19] The parties exchanged further correspondence, which included a request from the Trust for Ms Smith to attend a disciplinary meeting on 1 May 2009 at 9.30am before attending an organised mediation that was set to take place between the parties on the same day in Palmerston North. The Trust decided that Ms Smith breached a reasonable and lawful instruction when she did not attend the disciplinary meeting, whereas Ms Smith considered the request was unreasonable. Ms Smith did not attend the disciplinary meeting. After the mediation members of the Trust arrived at Ms

Smith's home to deliver a letter requiring her to attend a disciplinary meeting on 5 May. Ms Smith says that the members of the Trust arrived at her home in the Police van the Trust used. The impact of this is much less when it emerged in the evidence that the van was an unmarked van, but of course the point Ms Smith was making was that it was the method of the delivery of the letter at her home that upset her.

[20] The disciplinary meeting took place but failed to resolve any of the issues being raised on both sides. This appears to have been a disastrous meeting where no progress was made on anything. The Trust decided not to have the team leader present because of Ms Smith's allegations. Subsequently the Trust discussed issuing a final warning to Ms Smith. Also, the Trust requested more details of the specific complaints made against the team leader (7 May). These were provided on 12 May. The Trust issued a final warning dated 14 and 19 May 2009 with its findings on the disciplinary issues. Also, it announced it did not intend to investigate Ms Smith's concerns because it did not accept that there was a prima facie case. Ms Smith decided not to return because she felt the warning was unfair and the work environment was unsafe and that the Trust had not investigated her complaints about the team leader's behaviour. Ms Smith says the Trust's conduct and behaviour are examples of it setting out to intimidate and threaten and bully her.

[21] Throughout this time Ms Smith did not return to work and her employment effectively ended on 22 May 2009 when her pay ceased.

## **Determination**

### ***The suspension***

[22] The Trust's suspension was unjustified. It was in breach of the terms of the suspension provision under her employment agreement even although she was on pay. There was no agreed mutual variation to the suspension provision in the employment agreement and Ms Smith has claimed that the Trust acted unlawfully. I agree with Ms Smith. The Trust has breached her terms of employment in regard to the suspension provision that it had to comply with. It failed to consult and discuss the suspension with her before suspending her and failed to get her input and comments. Thus the Trust's action was unjustified. In addition I find that the reason for the suspension at

the time was to get Ms Smith to meet with the Trust over the issues it had with her. The reason relied upon now, relating to the issues, was not the reason at the time. Mr Piggott says that the Trust had issues that were serious enough to suspend Ms Smith. That was not the reason relied upon at the time and in any event the Trust had a responsibility to comply with the terms of the employment agreement notwithstanding any complaints about Ms Smith in her employment. The issues were such that a fair and reasonable employer would have consulted before invoking the suspension provision.

[23] Furthermore I find that the unjustified suspension put Ms Smith's employment in jeopardy and directly disadvantaged her in regard to her terms and conditions when she did not have the opportunity to be consulted and have a discussion for her input on being suspended, and finally, when she was warned. I accept it impacted on her employment negatively and as such disadvantaged her. In this regard she has a personal grievance.

### ***The warning***

[24] The final warning dated 14 and 19 May 2009 in light of the suspension was unjustified. It followed a disastrous disciplinary meeting. Ms Smith had never previously been warned about her performance or for any misconduct. The warning was unjustified because there was no discussion alerting her to that outcome as a preliminary decision before she was given the warning and the findings of the meeting held on 6 May. She did not have an opportunity to comment on alternatives to a final warning once it was given. Furthermore the issues that were raised were matters more to do with Ms Smith's performance than any serious misconduct and as such needed to be treated as performance related matters. In that context a final warning without any prior disciplinary management means that the employer's decision was unjustified.

### ***[25] How did Ms Smith's employment end?***

[26] I now turn to the question about how Ms Smith's employment ended. Although she was not actually dismissed the actions of her employer did involve an unjustified warning that was based on conclusions reached by the Trust about her

performance and alleged refusal to attend meetings and new allegations without any attempt to inquire into her concerns in a separate investigation.

[27] Ms Smith was requested to return to work by the Trust (14 May). She could not have abandoned her employment given that her employer had suspended her from work, given her a final warning and instructed her to return to work. Also, in the background her employer had the knowledge that Ms Smith had made serious allegations against her team leader. I am supported in reaching the conclusion that she did not abandon her employment because:

- Ms Wilson, a Trustee, accepted that Ms Smith's employment did not terminate by abandonment.
- There was a dispute over safety at work between Ms Smith and the Trust.
- Ms Smith did not resign.
- There was no investigation carried out and no procedure followed to investigate any of the allegations that Ms Smith refused to carry out a lawful instruction to return to work and any unauthorised absence.
- The Trust knew that Ms Smith would not return to work until the Trust investigated her allegations.

[28] Ms Smith made the decision not to return to work because she claimed she felt unsafe in the work place having to work with the team leader. The Trust despite knowing what the complaints were about decided the grounds did not amount to a prima facie case of misconduct. This was a reaction to the claims without a proper investigation; there was no questioning of any witnesses and no statements taken from those people who could have been witnesses. There was no information given to anyone about what the procedure for an investigation would involve. It was not clear if any staff members were spoken to and who they were. The team leader was not informed formally of the complaints other than being involved in some verbal discussions and a letter prepared advising Ms Smith of the findings of serious misconduct against her. In fact the applicant's complaints were serious matters deserving of an investigation and thus she reasonably concluded that she could not return to the workplace because the complaints related to the team leader, whom she had to work alongside. It was a small work place and no arrangements were put in

place to ensure a safe environment while the complaints were investigated, which is what a fair and reasonable employer would have done. The employer's failure to deal properly with the complaints, whether or not they had any foundation meant that the applicant's employment was terminated at the initiative of her employer when it unfairly and unreasonably considered she had abandoned her work; she had not resigned; and the respondent failed to investigate properly the matters that were linked to ensuring a safe work place. Finally the respondent stopped the applicant's salary.

## **Conclusion**

[29] It is my finding that Ms Smith has a personal grievance in respect of her suspension and warning, and her employment ending at the initiative of her employer for failing to undertake a proper investigation in regard to genuine complaints and when it was aware of the applicant's concerns.

[30] I have noted that the Trust believed that Ms Smith's complaints have only come about because of disciplinary issues relating to the management of her work performance and conduct. In addition disciplinary issues have come to the fore because of the Trust's belief that Ms Smith was deliberately not meeting with it. This matter has become hugely complicated by the involvement of competing allegations and issues between the Trust and Ms Smith. The responsibility rested with the employer to ensure that the different issues were clearly disposed of and put in the right procedure. Unfortunately that did not happen and if it did the outcome may have been entirely different.

## **Remedies**

[31] The remedies are global remedies to cover the unjustified suspension and warning and dismissal.

[32] There were no lost wages for the suspension, because she remained on pay, and no lost wages relating to the warning because Ms Smith was requested to return to work. Ms Smith has lost wages due to her dismissal when her wages stopped on 22 May when the decision was made not to continue paying her indefinitely. She was paid until 22 May with all her entitlements. There was no blameworthy conduct

contributing to her personal grievance. The Trust's frustration does not mean I can apportion blame on the applicant for the Trust's failure to take seriously the complaints and conduct an investigation. I accept that Ms Smith attempted, initially, to find other work, but I am not satisfied that her attempts were sufficient to award her the full six months claimed. I have reduced Ms Smith's loss to three months salary in the sum of \$11,750 under s 123 (1) (b) and s 128 of the Act.

[33] She is entitled to compensation for humiliation loss of dignity and injury to feelings for the unjustified suspension and warning and dismissal. She has established a claim where her evidence was that she was hurt, upset and that there has been a financial impact on her. Her feelings have also been affected by the inability to obtain employment and the impact on her of the situation on her family. I assess the compensation at \$10,000 under s 123 (1) (c) (i) of the Act without deduction because there was no contribution.

[34] In setting the remedies I have considered, as I must, the applicant's contribution to her grievance (s 124 of the Act applied). Firstly, the Trust says that Ms Smith deliberately avoided any meeting because of the issues and her part in them. Secondly it says that she deliberately raised issues about harassment and bullying to avoid dealing with the Trust's issues about her performance and work in her role.

[35] On the second point she was entitled to raise any concerns and in the background there were issues between her and the team leader without reaching any conclusions as to whether or not the issues amounted to harassment and bullying. I accept that Ms Smith genuinely raised the concerns genuinely.

[36] On the matter of the Trust's belief that Ms Smith deliberately failed to meet with it, the Trust became exasperated because Ms Smith did not attend meetings as requested. However, Ms Smith has provided reasonable explanations for not attending various meetings: she disputed that a meeting on 6 March was prearranged; she did not attend a meeting on 27 March because she felt threatened by her team leader's behaviour and she did not wish to meet with him. Her allegations were substantiated in writing later to support her. She gave evidence that before 27 March she did meet with the team leader; on another occasion she was sick; and there is evidence that she did attend a disciplinary meeting on 5 May. It was not fair that she

was required to attend a disciplinary meeting one hour before a scheduled mediation to be held with an independent mediator. She would not have been obliged to have attended that meeting given it was on the same morning as the scheduled mediation unless she agreed.

[37] I do not consider that the findings reached by the employer amount to contribution because they were matters for the employer and were never satisfactorily concluded given the applicant's different position over the various issues and the Trust's policies, the conflict over the warning, and Ms Smith's concerns were not properly dealt with and no arrangements provided for her to work in an environment to protect her while a proper investigation was carried out. Thus given the nature of her concerns and complaints she was entitled to some protection and it was not unreasonable to rely on her representative and deal with various issues by correspondence.

### **Orders of the Authority**

I order Life to the Max Horowhenua Trust to pay Ms Margaret Smith \$11,750 lost wages under s 123 (1) (b) and s 128 of the Act and \$10,000 compensation under s 123 (1) (c) (i) of the Act for hurt and humiliation.

[38] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority